92-181

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HONEYWELL INC.,
Petitioner,
v.
JOSEPH COLLINCINI,
Respondent.

Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

PAUL A. KOCHES *
JOSEPH BROOKS
POPHAM, HAIK, SCHNOBRICH & KAUFMAN, LTD.
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005
(202) 962-8700
Counsel for Petitioner Honeywell Inc.

* Counsel of Record

Date: July 24, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, damages may be imposed against an employer under state law solely because it communicated truthful information about a former employee to a second employer.

2. Whether, consistent with the First Amendment, damages may be imposed against an employer under state law solely because it characterized commercially sensitive information obtained by a former employee while in its employ as either "proprietary" or "trade secrets" in a letter written to a second employer.

PARTIES TO THE PROCEEDING

The Petitioner in this case is Honeywell Inc., a Delaware corporation with its principal place of business in Minneapolis, Minnesota.* The Respondent, Joseph Collincini, is an individual who resides in the state of Pennsylvania.

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in this case on November 26, 1991.

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* Honeywell Inc. has no parent companies. Honeywell Inc. has the following non-wholly owned subsidiaries:

Arbeitsmedizinische Betreuungsgesellschaft Kieler Betriebe m.b.H.
Berkat Honeywell Sdn. Bhd.
Dienes-Honeywell G.m.b.H.
Embrasid S.A.
Geomar Technologie G.m.b.H.
Goldstar-Honeywell Company, Ltd.
also, Yamatake-Honeywell Co., Ltd. owns 10%
Honeywell India Limited
Honeywell Kuwait K.S.C.
Honeywell Turki-Arabia Ltd.
NEC Honeywell Space Systems Ltd.
Saudi Arabian Tetra Tech Limited
Sinted S.p.A.
Space Controls Alenia-Honeywell S.p.A.
Sterch Controls
Systematics
Taishin Co., Ltd.
Tata Honeywell Limited.
Turnkiek Process Control B.V.
Yamatake & Co., Ltd.
Yamatake Control Products Co., Ltd.
Yamatake Engineering Service Co., Ltd.
Yamatake-Honeywell Co., Ltd.
Yamatake Keiso Co., Ltd.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania has not been reported and is reproduced in the Appendix for Petitioner at 25a.

The Opinion of the Superior Court of Pennsylvania is reported at 601 A.2d 292 (1991), and is reproduced in the Appendix for Petitioner commencing at page 1a.

The Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania, have not been reported and are reproduced in the Appendix for Petitioner, commencing at page 11a.

JURISDICTION

The Order of the Court of Common Pleas of Allegheny County, Pennsylvania denying Petitioner's post-trial motions was entered on November 15, 1990, and Judgment was entered by Praecipe of Respondent on December 20, 1990. A timely appeal followed, and the Judgment of the Superior Court of Pennsylvania was entered on November 26, 1991. A Petition for Reargument En Banc was filed with the Superior Court of Pennsylvania on December 10, 1991, and denied on January 31, 1992. A Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania on March 2, 1992, and denied on June 9, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case arises from the discharge of Respondent, Joseph Collincini ("Collincini"), by his former employer, American Technical Services, Inc. ("ATS"), a non-party. Petitioner, Honeywell Inc. ("Honeywell"), was Collincini's immediate past employer before he was employed by ATS.

Collincini began employment with Honeywell in 1974 as a salesman for its Industrial Services Division. For twelve years, Collincini sold maintenance contracts for industrial equipment while working out of Honeywell's Pittsburgh, Pennsylvania office. Incident to his employ-

ment, Collincini gained access to commercially sensitive information about Honeywell's business, including customers' identities, their particular needs, their contract renewal dates, their contract prices, and Honeywell estimating procedures. On October 15, 1986, Collincini was discharged by Honeywell because he had abandoned his position.

Six weeks after separating from Honeywell, Collincini began working in the Pittsburgh area for ATS, a competitor of Honeywell's. Collincini's job at ATS involved selling maintenance service contracts similar to those he had sold for Honeywell.

In January 1987, Honeywell learned that one of its customers had been lost to ATS through Collincini's efforts. Shortly thereafter, Honeywell received information that a second customer had been lost to ATS—again through Collincini's efforts. Honeywell investigated, and on March 3, 1987, a Honeywell in-house attorney wrote to ATS and reported these incidents.[1] The letter specifically described the types of commercially sensitive information gained by Collincini while employed by Honeywell and referred to such information as "trade secrets and other information which is highly proprietary and confidential to Honeywell." The letter also stated that Collincini had used this information while at ATS to call upon Honeywell customers in timely anticipation of their contract renewal dates and to underbid Honeywell's contract renewal prices. Finally, the letter identified two specific accounts that had been lost to ATS through Collincini's efforts.

After receiving the letter, the director of human resources for ATS contacted Honeywell by telephone, stated that ATS would look into the matter, and requested

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[1] Letter from Judith Ungar to Mr. Robert E. Henning dated March 3, 1987 (included in Appendix I to Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania), reproduced in Appendix at 21a-22a.

copies of any agreements or forms regarding Honeywell proprietary information that had been signed by Collincini. Honeywell then sent ATS a copy of the application form signed by Collincini at the commencement of his employment with Honeywell.

Three weeks later, in-house counsel for Honeywell wrote a second letter to ATS detailing two additional instances where Collincini had utilized Honeywell's commercially sensitive information to shift accounts from Honeywell to ATS.[2] Honeywell concluded this letter by requesting that "good faith action [be] taken by ATS to end these practices immediately." One week later, Collincini was discharged by ATS.

Collincini sued Honeywell in the Court of Common Pleas of Allegheny County, Pennsylvania, for defamation and intentional interference with known contractual relations.[3]

At trial, Collincini's testimony verified the factual accuracy of the statements in the two Honeywell letters. Specifically, Collincini testified that: (1) he had contacted the four firms identified in the two Honeywell letters while employed by ATS; (2) each of those firms had been a Honeywell customer that he had been responsible for while employed by Honeywell; (3) he had learned the expiration dates of the four firms' contracts while employed by Honeywell; (4) he had used "Honeywell pricing information in the attempt to construct and

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[2] Letter from Judith Ungar to Mr. Robert E. Henning dated March 25, 1987 (included in Appendix I to Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania), reproduced in Appendix at 19a-20a.

[3] Collincini also sued ATS for defamation and tortious interference with contract. Both counts against ATS were dismissed with prejudice in pretrial proceedings. In an amended complaint Collincini sued ATS for wrongful discharge, but that count was discontinued by consent order. 601 A.2d at 294 n.1, Appendix at 2a-3a n.1.

price maintenance service contracts" while employed by ATS; and (5) each of the four customers identified in the two Honeywell letters had shifted its account from Honeywell to ATS at the time of its Honeywell contract renewal date.[4] At the close of all the evidence,[5] Honeywell requested that the following instruction be included in the charge on the tortious interference with contract claim:

> The 1st Amendment of the U.S. Constitution protects the freedom of speech, and the freedom to have opinions. If the defendant assembled and communicated to plaintiff's subsequent employer a statement of facts pertaining to plaintiff's conduct and presented a legal argument or legal opinion why such conduct violated defendant's legal rights, and if the facts presented were substantially true, then the defendant cannot incur liability to the plaintiff.[6]

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[4] Trial Transcript at 362, 401, 406-07, and 451, reproduced in Appendix at 29a-32a.

[5] At trial, the director of human resources for ATS at the time Collincini was discharged testified that ATS had not understood Honeywell's letters to request that ATS discharge Collincini. Trial Transcript at 645, Appendix at 33a. Moreover, she testified that ATS did not discharge Collincini because of anything Honeywell had done, but rather because the Pittsburgh office was not profitable and ATS was planning to close it down. Trial Transcript at 646-47, Appendix at 34a-35a. The only evidence that conflicted with this testimony was the testimony of ATS's former Pittsburgh branch manager, who had been fired by ATS before trial for gross misconduct. He testified that a second ATS employee who was not even at ATS at the time of the Collincini discharge told him during a regional sales meeting some months after the Collincini discharge that a third ATS employee had said that Collincini had been let go because of the Honeywell letters. Trial Transcript at 507-08, Appendix at 32a-33a. Trial counsel for Honeywell neglected to object to this rank hearsay and it was admitted into evidence. 601 A.2d at 295, Appendix at 4a-5a.

[6] Defendant's Requested Points For Jury Instruction, No. 14 (quoted in full at 601 A.2d 292, 296 n.3, Appendix at 7a n.3).

The trial court affirmed the requested instruction,[7] but then inexplicably failed to include it (or anything like it) in the charge to the jury.[8] After the charge was delivered, Honeywell objected to the omission of its requested instruction.[9] However, the trial court overruled that objection.[10]

The jury found in favor of Honeywell on the defamation claim, but found in favor of Collincini on the tortious interference with contract claim. Collincini was awarded $100,000 in compensatory damages[11] and $400,000 in punitive damages.[12]

By post-trial motion, Honeywell sought a new trial raising, *inter alia*, the trial court's failure to include the requested instruction. However, after expressly addressing this ground, the trial court denied the relief sought.[13]

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[7] Trial Transcript at 706, Appendix at 35a.

[8] Trial court charge to the jury, Trial Transcript at 773 796, Appendix at 35a-48a.

[9] *Id.* at 798, Appendix at 48a.

[10] *Id.*

[11] As the Superior Court of Pennsylvania noted in its Opinion, during the time period for which the jury awarded these damages "Collincini frequented the racetrack for a year instead of taking another sales job. . . ." 601 A.2d at 297, Appendix at 9a. Indeed, Collincini's testimony at trial established that for tax year 1989, he listed "horse racetrack wagering" as his principal occupation on his federal income tax return, spent 260 days at racetracks, logged over 33,000 miles traveling to bet on horses, and had over $102,000 in winnings. Trial Transcript at 308-09, 316-18, Appendix at 26a-29a.

[12] Honeywell had counterclaimed against Collincini for monies due and still owed for failure to repay unused travel advances and for two dishonored checks he had written to Honeywell. The jury found in favor of Honeywell on this claim and awarded it the amount owed. 601 A.2d at 294 and n.2, Appendix at 3a and n.2.

[13] Appendix at 15a-16a.

Honeywell then took a timely appeal to the Superior Court of Pennsylvania.[14] In its Opinion rendered on November 26, 1991, that court expressly addressed the issue of "whether letters, containing true statements of fact and an opinion based on those facts, written to appellee's employer, can constitute tortious conduct on the part of a former employer." [15] While discussing this issue, the Opinion also quoted, in full, Honeywell's requested jury instruction referencing the First Amendment.[16] The Superior Court of Pennsylvania then held as follows:

> Honeywell's suggested fourteenth point is a misstatement of the law, and as such was not relevant. Truth is an absolute defense to defamation; it is *not* a defense to intentional interference with contractual relations.[17]

As an alternative ground for affirming the judgment of the trial court, the Superior Court of Pennsylvania—while expressly conceding that the statements about Collincini included in Honeywell's letters were "factually correct"—held that Honeywell's "characterization of the information Collincini relied on to obtain those contracts as proprietary or trade secrets is false as a matter of law." [18]

Honeywell filed a timely Petition for Reargument En Banc, which was denied on January 31, 1992.[19]

Thereafter, on March 2, 1992, Honeywell filed a timely Petition for Allowance of Appeal with the Supreme Court

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[14] 601 A.2d at 294, Appendix at 3a and 24a.

[15] *Id.*

[16] 601 A.2d at 296 n.3, Appendix at 7a n.3.

[17] 601 A.2d at 296, Appendix at 8a (emphasis in original).

[18] *Id.*

[19] 601 A.2d at 292, Appendix at 1a and 23a.

of Pennsylvania.[20] The Petition was denied on June 9, 1992.[21]

REASONS FOR GRANTING THE WRIT

I. Introduction

This case involves a federal question of substantial importance which the Superior Court of Pennsylvania has decided in a manner that directly conflicts with decisions of two United States courts of appeals: whether, consistent with the First Amendment, liability can be imposed for tortious interference with contract under state law based solely upon the communication of truthful information. The decision below is also inconsistent with the applicable decisions of this Court and of the highest court of one other state.

The holding of the Superior Court of Pennsylvania that truth is not a defense to a tortious interference with contract claim based solely upon the communication of information to a third party, and its alternative holding that liability can be predicated solely upon an employer's characterization of its commercially sensitive information as "proprietary" or "trade secrets", are directly at variance with the decisions in *Redco Corp. v. CBS, Inc.*, 758 F.2d 970 (3d Cir.), *cert. denied*, 474 U.S. 843 (1985), and *Henderson v. Times Mirror Co.*, 669 F. Supp. 356 (D. Colo. 1987), *aff'd without opinion*, 876 F.2d 108 (10th Cir. 1989). In addition, the implicit holding of the court

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[20] In the Petition, Honeywell raised the issue of whether liability could be imposed consistent with the First Amendment based solely upon its letters, and cited to decisions of this Court and the United States Court of Appeals for the Third Circuit. Petition For Allowance of Appeal at 11-12 (*citing Gertz v. Welch*, 418 U.S. 323, 339-40 (1974) and *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972-73 (3d Cir.), *cert. denied*, 474 U.S. 842 (1985)).

[21] Letter from Irma T. Gardner, Deputy Prothonotary, The Supreme Court of Pennsylvania, to William Pietragallo and Pamela G. Cochenour, dated June 9, 1992, reproduced in Appendix at A-25a.

below, that tort claims other than defamation are wholly outside the reach of the First Amendment, conflicts with the applicable decisions of this Court and the decision of the Supreme Court of Connecticut in *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982).

Accordingly, it is respectfully submitted that this Court should review the decision of the Superior Court of Pennsylvania in this case and, upon review, reverse that decision.

II. The Decision Below Holding That The First Amendment Does Not Require That Truth Be Recognized As A Defense To A Tortious Interference With Contract Claim Based Solely Upon The Communication Of Information To A Third Party Is In Direct Conflict With Decisions Of Two United States Courts Of Appeals.

In *Redco Corp., supra*, the plaintiff, a manufacturer of multi-piece tire rims used on trucks and buses, sued a trade association of insurers and the CBS television network alleging trade libel, disparagement, defamation, tortious interference with existing and prospective business relations and conspiracy. The claims arose out of CBS's broadcast on the show "60 Minutes" of a segment entitled "Killer Wheels" which portrayed the multi-piece rims as dangerous. The trade association had assisted CBS in the preparation of the segment.

The Third Circuit found that "[t]he district court made a detailed analysis of each of the individual, allegedly defamatory statements [included in the broadcast], and concluded that each one was either true or non-actionable because it was a statement of opinion." 758 F.2d at 971-72. The court then held as follows:

> The issues discussed in the broadcast were matters of public concern, the facts disclosed were true and the program adequately disclosed the basis for the opin-

> ions expressed. Therefore, we conclude that the district court committed no error in holding that as a matter of law Redco could not recover for defamation or product disparagement based on the broadcast.
>
> *Since neither CBS nor [the trade association] can be found liable for defamation, the intentional interference with contractual relations count is not actionable because there is no basis for finding that their actions were "improper"*. . . .

Id. at 972-73 (emphasis added).

In *Times Mirror, supra*, the plaintiff, a football players' agent, brought an action against a professional football coach and a newspaper that had reported statements made by the coach about the agent. The plaintiff alleged libel and slander, disparagement and intentional interference with contractual relations. At issue were the coach's statements that the agent was a "sleazebag" who "slimed up from the bayou." The agent claimed, *inter alia*, that in consequence of these statements and their publication, one of his clients terminated his contract with the agent.

The court in *Times Mirror*, relying principally upon this Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), held that the challenged statements constituted opinion not susceptible of being proven false and, therefore, were not actionable as defamation. 669 F. Supp. at 362. Then, with respect to the intentional interference with contract claim, the court held as follows:

> In his amended complaint, the plaintiff alleges that "the defendants by communication and publication of the slanderous statements . . . intentionally induced [his client] to terminate his contract with the plaintiff." However, the court in *Redco* . . . held that since the defendants could not be liable for defamation arising out of their statements . . . the intentional interference with contractual relations claim was likewise not actionable because there was no basis for finding that their actions were improper. *Thus, the plaintiff's claim of intentional interference with*

> *contract cannot be predicated on [the coach's] expression of opinion, and therefore, this claim also must be dismissed.*

Id. (emphasis added) (citation omitted). The Tenth Circuit affirmed without opinion. 876 F.2d 108 (10th Cir. 1989).

The clear import of *Redco*, *supra*, and *Times Mirror*, *supra*, is that, consistent with the First Amendment, liability cannot be imposed on a claim for tortious interference with contract based solely upon the communication of statements that would be constitutionally protected from liability on a claim for defamation. In short, truth *is* a defense to such a claim.

In this case, the trial court failed to instruct the jury, as requested, that liability could not be imposed on Honeywell based solely upon its letters if the statements included therein were truthful. It is entirely possible therefore, that the jury imposed liability on Honeywell solely because it sent the two letters to ATS—even though it found that the letters were truthful. Indeed, the jury finding in favor of Honeywell on the defamation claim indicates that this is precisely what occurred. As this Court has held, however, "it is impossible to know [why the jury found as it did], in view of the general verdict returned. Because of this uncertainty, [in such cases] the judgment must be reversed and the case remanded." *New York Times Co. v. Sullivan*, 376 U.S. 254 284 (1964).[22] The holding of the Superior Court of Pennsylvania in this case is, therefore squarely at odds with the decisions of the Third Circuit in *Redco*, *supra*, and the Tenth Circuit in *Times Mirror*, *supra*.

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[22] The Supreme Court of Pennsylvania has also held that a new trial is required when erroneous jury instructions are coupled with a general verdict. *Vaughn v. Philadelphia Transp. Co.*, 417 Pa. 464, 468, 209 A.2d 279, 282 (1965) ("If it appears that such instructions *might* have been responsible for the verdict, a new trial is mandatory.").

Furthermore, this Court has held on a number of occasions that First Amendment principles are applicable to tort claims other than defamation which arise solely out of the communication of information to third parties. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (holding that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication . . . without showing . . . that the publication contains a false statement of fact which was made with 'actual malice' "); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (applying First Amendment principles to state law cause of action for invasion of privacy); *Time, Inc. v. Hill*, 385 U.S. 374, 390-91 (1967) (applying First Amendment principles to New York statutory action for "false light" invasion of privacy). *Cf. Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984) (in case involving district court conclusion that "the *New York Times* rule should be applied to a claim of product disparagement," this Court "express[ed] no view on that ruling, but . . . accepted it for purposes of deciding the case").[23] Thus, the holding of the Superior Court of Pennsylvania that First Amendment principles have no application to this tortious interference with contract claim is inconsistent with the applicable decisions of this Court. *See also U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 931 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990) (holding First Amendment principles applicable to claims for violation of Section 43(a) of the Lanham Act, defamation, commercial disparagement and tortious interference with contract); *Goodrich v. Waterbury Re-*

[23] *But see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578-79 (1977) (First Amendment does not limit state's ability to protect performer's commercial stake in his entire act by allowing damage action for appropriation of "right of publicity"). *Zacchini* is distinguishable from the cited cases, and the instant case, because it did not involve reporting of events, but rather publication of a performance in which the performer had a legally recognized commercial interest. *Id.* at 574.

publican-American, Inc., 188 Conn. 107, 132, 448 A.2d 1317, 1331 (1982) (holding First Amendment principles applicable to claims for false light invasion of privacy and for unreasonable publicity given to one's private life).[24]

Nor does the fact that this case involves a private-figure plaintiff and speech that is arguably not a matter of public concern take it outside the reach of the First Amendment. This is made clear by this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), wherein it stated:

> We do not suggest, however, that [a private person's] speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded'." We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.

Id. at 147 (citations omitted). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (plurality opinion of Justice Powell, joined by Justice Rehnquist and Justice O'Connor) (stating that speech on matters of purely private concern is "not totally unprotected by the First Amendment").

Yet prohibition and punishment of truthful speech based solely upon its content are exactly what result from the decision of the Superior Court of Pennsylvania in this case. Indeed, that decision completely bars employers from

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[24] One other state's highest court has held that First Amendment principles have no application to an action for tortious interference with contract. *Chaves v. Johnson*, 230 Va. 112, 121-22, 335 S.E.2d 97, 103 (1985).

communicating with other employers on certain matters that are of legitimate concern and which relate to the successful operation of their businesses. Because the decision below conflicts with the decisions of the Third Circuit in *Redco*, *supra*, and the Tenth Circuit in *Times Mirror*, *supra*, and because the decision below also conflicts with the applicable decisions of this Court and a decision of the highest court of one other state, a Writ of Certiorari should issue to the Superior Court of Pennsylvania to review its decision in this case.

III. The Decision Below Holding That Honeywell's Characterization Of Its Commercially Sensitive Information As "Proprietary" Or "Trade Secrets" Was False As A Matter Of Law, And Therefore Actionable, Is In Direct Conflict With Decisions Of Two United States Courts Of Appeals.

As an alternative basis for affirming the judgment of the trial court, the Superior Court of Pennsylvania held that, "while Honeywell's list of contract renewals lost to ATS might be factually correct, its characterization of the information Collincini relied on to obtain those contracts as proprietary or trade secrets is false as a matter of law." 601 A.2d at 296.[25] Thus the court held that liability could be predicated solely upon Honeywell's "characterization" of its commercially sensitive information. In both *Redco*, *supra*, 758 F.2d at 973, and *Times Mirror*, *supra*, 669 F. Supp. at 362, however, the courts held that liability in a tortious interference with contract action cannot, consistent with the First Amendment, be predicated solely upon statements of opinion. *Cf. Goodrich v. Waterbury Republican-American, Inc.*, *supra*, 188 Conn. at 131-33, 448 A.2d at 1330-31 (Connecticut Supreme Court held that neither a claim for false light invasion of

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[25] Appendix at 8a.

privacy nor a claim for unreasonable publicity given to one's private life could be predicated solely upon a constitutionally protected statement of opinion).

In each of the three cases cited above, the court relied upon this Court's earlier decision in *Gertz v. Robert Welch, Inc.*, *supra*, to support its holding that the opinion in issue was constitutionally protected. Subsequent to those decisions, this Court held that there is no absolute constitutional privilege for "opinions" such as that recognized by a number of lower courts in what this Court held to be "mistaken reliance on the *Gertz* dictum." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706 (1990). However, this Court did *not* hold that opinions enjoy *no* protection under the First Amendment. Rather, while "dispel[ling] any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections . . . already found to be guaranteed by the First Amendment, [this Court] determine[d] that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine." *Milkovich*, *supra*, 110 S. Ct. at 2708 (Justice Brennan, with whom Justice Marshall joins, dissenting) (emphasis in original). This was subsequently confirmed in *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2432 (1991), where this Court stated that *Milkovich*, *supra*, had held only that opinions were outside the protection of the First Amendment when "a reasonable trier of fact could find that the so-called expressions of opinion could be interpreted as including false assertions as to factual matters."

In *Masson*, *supra*, this Court also explained what must be shown before a statement (or opinion) can be deemed false:

> Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced."

Id., 111 S. Ct. at 2433 (citations omitted).[26]

Thus, to the extent that *Redco*, *supra*, and *Times Mirror*, *supra*, held that statements of opinion which do not include false assertions as to factual matters cannot, consistent with the First Amendment, serve as the predicate for a tortious interference with contract claim, they remain good law.

"[I]n cases raising First Amendment issues [this Court] ha[s] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'." *Bose Corp. v. Consumers Union of U.S. Inc.*, *supra*, 466 U.S. at 499 (citing *New York Times Co.*, *supra*, 376 U.S. at 284-86). Here, the court below held the following language from Honeywell's letter to be an actionable "characterization":

> Mr. Collincini's position gave him access to trade secrets and other information which is highly proprietary and confidential to Honeywell. Such information includes, but is not limited to, the identity of Honeywell customers, their particular needs, contract prices and anniversary dates, and Honeywell estimating procedures. Such information was gathered and/or produced by Honeywell at considerable expense.[27]

As shown above, the record makes plain that the statements in Honeywell's letter describing the kinds of in-

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[26] Even though this case involves private individuals and speech on matters not of public concern, the *Masson* formulation for determining falsity still governs. "The essence of th[e] inquiry . . . remains the same whether the burden [of proving truth or falsity] rests upon plaintiff or defendant." *Masson*, *supra*, 111 S. Ct. at 2433.

[27] Letter from Judith Ungar to Mr. Robert E. Henning dated March 3, 1987, reproduced in Appendix at 21a-22a.

formation obtained by Collincini while employed by Honeywell were "factually correct" and the Superior Court of Pennsylvania conceded as much. 601 A.2d at 296.[28] Thus, unless a reasonable trier of fact could find that the characterization of such information as "proprietary" or "trade secrets" amounted to a false assertion as to factual matters, the language quoted above from Honeywell's letter would, under *Redco*, *supra*, and *Times Mirror*, *supra*, enjoy First Amendment protection from liability in a tortious interference with contract action.

To support its holding that the characterization as "proprietary" or "trade secrets" of the information used by Collincini to ply away Honeywell's customers was "false as a matter of law," the court below cited two cases which had held that certain employers' customer information was not entitled to trade secret protection under Pennsylvania law. 601 A.2d at 296.[29] But the analysis in each of those cases was fact intensive, and, in both instances, the Pennsylvania Supreme Court expressly acknowledged that customer information has often been afforded some protection from use by former employees under Pennsylvania law.[30] Moreover, other Pennsylvania cases have held that information substantially similar to that here in issue *would* merit protection *as trade secrets* under Pennnsylvania law.[31] Thus, it is at least clear that "the

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[28] Appendix at 8a.

[29] Appendix at 8a-9a. The cases cited by the court are *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 213 A.2d 769 (1965) and *Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy*, 415 Pa. 276, 203 A.2d 469 (1964).

[30] *Van Products*, *supra*, 419 Pa. at 262, 213 A.2d at 777 ("[i]t is clear that this jurisdiction affords protection to an employer's confidential customer information."); *Carl A. Colteryahn Dairy*, *supra*, 415 Pa. at 279, 203 A.2d at 471 ("we have long recognized that the use of confidential material obtained by an employee from a position of trust and confidence may not be used in later competition to the prejudice of his employer.").

[31] *Morgan's Home Equip. Corp. v. Martucci*, 390 Pa. 618, 623-24, 136 A.2d 838, 842-43 (1957) (information about customers, even

substance, the gist, the sting" of the characterization used by Honeywell was "justified", and that it cannot reasonably be "interpreted as including false assertions as to factual matters." *Masson, supra*, 111 S. Ct. at 2432. Consequently, Honeywell's "characterization" of its commercially sensitive information cannot serve as the predicate for liability on Collincini's tortious interference with contract claim. *Redco, supra*; *Times Mirror, supra*.[32]

CONCLUSION

The decision of the Superior Court of Pennsylvania holding that truth is not a defense to an action for tortious interference with contract relations based solely upon communication of information, and holding in the alternative that liability on such a claim can be predicated solely upon the characterization of commercially sensitive information as either proprietary or trade secrets, is inconsistent with decisions of two United States courts of

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absent written non-disclosure covenant and even though not written down, held entitled to protection as a trade secret). *See also SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1260 (3d Cir. 1985) (holding costing and pricing information similar to Honeywell estimating procedures to be entitled to protection as trade secret under Pennsylvania law).

[32] In the same vein, under *Bose, supra*, and *New York Times, supra*, the Superior Court of Pennsylvania's conclusion that "[e]vidence admitted at trial indicated that Honeywell knew at the time the first letter was written that it had no cause of action against Collincini or ATS," 601 A.2d at 295-96, Appendix at 6a-7a, merits scrutiny. The apparent purpose for singling out this evidence was to suggest yet another alternative basis for finding some false statement in Honeywell's letters. However, the evidence referred to, an internal Honeywell memorandum prepared by in-house counsel, does *not* conclude that Honeywell had no cause of action based upon Collincini's actions. Rather, it plainly advises that an action would lie against Collincini or ATS so long as adequate proof of Collincini's activities could be obtained. Defendant's Trial Exhibit "R", reproduced in Appendix at 49a-51a.

appeals, the applicable decisions of this Court and a decision of the highest court of another state. The decision below is important because it creates a rule of law that prohibits and punishes certain speech based solely upon its content. Accordingly, a Writ of Certiorari should be issued by this Court to review the decision of the Superior Court of Pennsylvania and, upon review, this Court should reverse that decision.

Respectfully submitted,

PAUL A. KOCHES *
JOSEPH BROOKS
POPHAM, HAIK, SCHNOBRICH
& KAUFMAN, LTD.
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005
(202) 962-8700

Counsel for Petitioner
Honeywell Inc.

* Counsel of Record

Date: July 24, 1992

APPENDICES

APPENDIX A

SUPERIOR COURT OF PENNSYLVANIA

JOSEPH COLLINCINI

v.

HONEYWELL, INC.,

Appellant

Argued Aug. 22, 1991

Filed Nov. 26, 1991

Reargument Denied Jan. 31, 1992

Joseph Brooks, Washington D.C., for appellant.

Vicki Kuftic Horne, Pittsburgh, for appellee.

Before WIEAND, CIRILLO and JOHNSON, JJ.

CIRILLO, Judge:

This is an appeal from a judgment entered in the Court of Common Pleas of Allegheny County awarding appellee Joseph Collincini $100,000.00 in compensatory damages and $400,000.00 in punitive damages from appellant Honeywell, Inc. We affirm.

Appellee Collincini worked for appellant Honeywell, Inc. ("Honeywell") in the Industrial Services Division in Pittsburgh from 1972 until he was discharged in 1986. Six weeks after separating from Honeywell, Collincini began working in the Pittsburgh area for American Technical Services, Inc. ("ATS"), a minor competitor of Honeywell's. Part of Collincini's job at ATS was

selling maintenance service contracts similar to those he sold for Honeywell.

Three months after Collincini began working for ATS, counsel for Honeywell wrote to the president of ATS in Georgia, complaining that Collincini was using proprietary information from Honeywell and "engaging in unfair competition against Honeywell and wrongful interference with Honeywell contractual relations with third party customers." After listing contracts lost to ATS, Honeywell's attorney continued:

> Honeywell is certain that ATS, as a responsible company, will investigate Mr. Collincini's actions and prevent their recurrence. Should such unfair practices continue, Honeywell will pursue its available legal remedies to the fullest.

In response, ATS stated that it would check into the matter, and requested copies of any agreements or forms, regarding Honeywell proprietary information, that Collincini had signed. Honeywell sent a copy of the application form Collincini had signed when he began working for Honeywell. The application contained no reference to a non-compete clause.

Three weeks later counsel for Honeywell wrote a second letter to the president of ATS, in which she detailed "two additional instances of Mr. Collincini's continuing wrongful interference with Honeywell contractual relations" and also accused Collincini of using inside information to take business away from Honeywell. The letter concluded with the admonition that, "Honeywell expects evidence of good faith action taken by ATS to end these practices immediately." One week later Collincini was dismissed from ATS.

Collincini sued Honeywell for intentional interference with known contractual relations, and for defamation.[1]

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[1] In his original complaint Collincini sued ATS as well as Honeywell for tortious interference and defamation. Both counts against

Honeywell counterclaimed for monies due and still owed by Collincini under the terms of his employment contract with them. The jury found in favor of Collincini on the complaint of tortious interference with a contract, awarding him both compensatory and punitive damages, and found for Honeywell on the defamation complaint. The jury also found in favor of Honeywell on the counterclaim, and awarded the company damages in the amount owed.[2] Both parties filed post-trial motions which were denied. This timely appeal followed.

Honeywell raises five issues for our consideration: 1) whether hearsay evidence admitted without objection is legally sufficient to support a verdict in favor of the appellee; 2) whether letters, containing true statements of fact and an opinion based on those facts, written to appellee's employer, can constitute tortious conduct on the part of a former employer; 3) whether the failure to include a timely requested instruction in the charge to the jury requires the granting of a new trial; 4) whether failure to mitigate damages bars recovery; and 5) whether failure to instruct the jury that punitive damages must bear a reasonable relationship to compensatory damages warrants a new trial.

Our standard of review of an order denying judgment notwithstanding the verdict is whether there was sufficient competent evidence to sustain the verdict. *Wenrick*

ATS were dismissed with prejudice in pre-trial proceedings. In his amended complaint Collincini sued ATS for wrongful discharge, but that count was discontinued by a consent order. Thus Honeywell was the only defendant at trial.

[2] Honeywell has a system of "travelchecks" which their sales force can use either to obtain advance funds or reimbursement for business travel expenses. Collincini had written two dishonored checks to Honeywell and had failed to repay unused travelcheck advances. After his final paycheck was withheld, Collincini still owed Honeywell $1812.34. The jury awarded Honeywell $1812.34, plus six percent interest.

v. Schloemann-Siemag Aktiengesellschaft, et al., 523 Pa. 1, 4, 564 A.2d 1244, 1246 (1989). To make that determination we must consider all the evidence received, whether the trial court ruled correctly on its admissibility or not. *Lira v. Albert Einstein Medical Center*, 384 Pa.Super. 503, 508, 559 A.2d 550, 552 (1989). We must also afford the verdict winner the benefit of every inference which may reasonably be drawn from the evidence, while rejecting all unfavorable testimony and inferences. *Ingrassia Construction Company, Inc. v. Walsh*, 337 Pa. Super. 58, 61, 486 A.2d 478, 480 (1984). Judgment notwithstanding the verdict may be granted only in a clear case where the facts are such that no two reasonable minds could fail to agree that the verdict was improper. *Gray v. H.C. Duke & Sons, Inc.*, 387 Pa.Super. 95, 563 A.2d 1201 (1989). We note that judgment n.o.v. may *not* be employed to invade the province of the jury. *Trawick v. Nationwide Mutual Insurance Co.*, 242 Pa. Super. 271, 363 A.2d 1265 (1976). Thus when there is a question of fact to be resolved, it is within the sole purview of the jury. *Id.*

The standard of review for an order denying a motion for a new trial is whether the trial court clearly and palpably abused its discretion or committed an error of law which controlled the outcome of the case. *Stevenson v. General Motors Corp.*, 513 Pa. 411, 425, 521 A.2d 413, 420-421 (1987). If support for the trial court's decision is found in the record, the order must be affirmed. *Commonwealth ex rel. Meyers v. Stern*, 509 Pa. 260, 264, 501 A.2d 1380, 1382 (1985). When the record is reviewed in light of these principles, it is clear that the jury's verdict in favor of Collincini must stand.

Honeywell first contends that the hearsay statement of John Relja is insufficient without corroboration to sustain a finding that Honeywell's letters to ATS were the proximate cause of Collincini's dismissal. We disagree. Relja was the branch manager for the Pittsburgh office and

Collincini's supervisor at ATS. Relja testified at trial that his own supervisor, John Timiny, had explained Collincini's dismissal as follows: "Honeywell wrote letters to the president [of ATS], Mr. Hennig, and they were putting pressure on him, and the easiest way out of his situation was to let Joe Collincini go." Honeywell neglected to object to Relja's testimony and it was admitted into evidence.

"It is well established that hearsay evidence, admitted without objection, is *accorded the same weight* as evidence legally admissible as long as it is relevant and material to the issues in question." *Jones v. Spidle*, 446 Pa. 103, 106, 286 A.2d 366, 367 (1971) (citations omitted) (emphasis supplied). It is also well established in the Commonwealth that the weight and credibility to be accorded evidence is up to the factfinder to determine. *See Wilson v. Benjamin*, 332 Pa.Super. 211, 481 A.2d 328 (1984); *Jim McKain Ford, Inc. v. Oliver*, 272 Pa. Super. 104, 414 A.2d 691 (1978). Relja's testimony about the explanation given him for Collincini's termination was both relevant and material. Honeywell does not contest that it had the opportunity at trial to object to the admission of the hearsay statement, and that it failed to do so. Therefore, Honeywell cannot now be heard to complain about the consequences of its failure to act. The jury as the fact finder was free to believe—or disbelieve —Relja's testimony. The jury chose to believe his testimony, and chose to attribute Honeywell's communications with ATS as the proximate cause of Collincini's dismissal. "It is *not* within this court's province to weigh the evidence or to render judgments as to credibility.") *Ingrassia Construction Company, Inc.*, 337 Pa.Super. at 62, 486 A.2d at 480 (emphasis added). Viewing the evidence in the light most favorable to Collincini, as verdict winner, we find that there was sufficient competent evidence to support the jury's determination of proximate cause. *Id.*

Honeywell next contends that its letters to the president of ATS cannot constitute tortious conduct because

the letters only contain statements of fact and opinions based on those facts. We disagree. In *Birl v. Philadelphia Electric Company*, 402 Pa. 297, 167 A.2d 472 (1960), our supreme court, citing the *Restatement of Torts*, Section 766, stated: "It is generally recognized that one has the right to pursue his business relations or employment free from interference on the part of other persons except where such inference is justified or constitutes an exercise of absolute right." *Id.* at 300, 167 A.2d at 474 (1960). Here Honeywell claims no absolute right; it merely insists that since the statements in its letters are true the letters cannot be tortious. Such reasoning is fallacious.

For the tort of intentional interference with contractual relations to lie: "[T]he actor must act (1) for the purpose of causing this specific type of harm to the plaintiff, (2) such act must be unprivileged, and (3) the harm must actually result." *Id.* The first element of purpose or intent need not be malice or ill will; rather, it refers to purposeful interference without justification. *Id.* As this court stated in *Geyer v. Steinbronn*, 351 Pa.Super. 536, 553, 506 A.2d 901, 910 (1986), it will be the rare defendant who admits he did intend to interfere with the plaintiff's contractual relations. "Therefore, the jury usually will be called upon to draw an inference from circumstantial evidence. The defendant's state of mind and possible motives are certainly relevant to the inquiry even if ill will per se is not a requisite." *Id.*

Within weeks of joining ATS, Collincini was successful in convincing a few companies to transfer their maintenance contracts at their contract renewal dates from Honeywell to ATS. Honeywell, which is a much larger entity in the marketplace, responded by having its legal department write to ATS several times, claiming that Collincini was engaging in unfair competition and pressuring ATS to put a stop to it. Evidence admitted at trial indicated that Honeywell knew at the time the first

letter was written that it had no cause of action against Collincini or ATS. Despite that knowledge, Honeywell wrote and threatened legal action if ATS did not instruct Collincini to cease soliciting contract renewals from Honeywell customers. Collincini had never signed a non-compete contract with Honeywell, and the proprietary information and trade secrets he was accused of using consisted of nothing more than unclassified information available on the open market. *See Spring Steels, Inc. v. Malloy*, 400 Pa. 354, 162 A.2d 370 (1960); *Fidelity Fund, Inc. v. DiSanto*, 347 Pa.Super. 112, 500 A.2d 431 (1985). Moreover, Honeywell never contacted Collincini directly to complain about his behavior. Instead, it chose to write directly to Collincini's employer on three different occasions. We conclude that the record contains ample evidence from which the jury could infer that Honeywell intentionally interfered with Collincini's employment relationship with ATS.

Honeywell next contends that the trial court's failure to include Honeywell's fourteenth point of requested instruction in its charge to the jury mandates a new trial.[3] We disagree.

> It is well settled in our Commonwealth that when the propriety of the jury instruction of the trial court is at issue, those instructions must be viewed *in toto* to determine if any error has been committed. Unless the charge as a whole can be demonstrated

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[3] Honeywell's requested instruction reads:

> The 1st Amendment of the U.S. Constitution protects the freedom of speech, and the freedom to have opinions. If the defendant assembled and communicated to plaintiff's subsequent employer a statement of facts pertaining to plaintiff's conduct and presented a legal argument or legal opinion why such conduct violated defendant's legal rights, and if the facts presented were substantially true, then the defendant cannot incur liability to the plaintiff.

> to have caused prejudicial error, we will not reverse for isolated inaccuracies. (citations omitted).

Pachesky v. Getz, 353 Pa.Super. 505, 511, 510 A.2d 776, 779 (1986), quoting *Riddle Memorial Hospital v. Dohan*, 504 Pa. 571, 576, 475 A.2d 1314, 1316 (1984). A trial court judge has wide latitude in instructing a jury, and he or she may use any language of his or her choice as long as the questions and issues to be resolved are clear. *Pagesh v. Ucman*, 403 Pa.Super. 549, 589 A.2d 747, 749 (1991).

We have reviewed the jury instructions in their entirety, and we find that the trial court adequately addressed each of the pertinent issues presented at trial. The trial court was under no obligation to include Honeywell's fourteenth point in its charge to the jury. Honeywell's suggested fourteenth point is a misstatement of the law, and as such was not relevant. Truth is an absolute defense to defamation; it is *not* a defense to intentional interference with contractual relations. Furthermore, while Honeywell's list of contract renewals lost to ATS might be factually correct, its characterization of the information Collincini relied on to obtain those contracts as proprietary or trade secrets is false as a matter of law.[4] *See Van Products Co. v. General Welding*

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[4] Our supreme court has stated that "the employee, upon terminating his employment relationship with his employer, is entitled to take with him the 'experience, knowledge, memory, and skill, which he had gained while there employed.' " *Van Products Co. v. General Welding & Fabricating Co.*, 419 Pa. 248, 259-61, 213 A.2d 769, 776 (1965) (citations omitted). The court continued to explain that " 'the intimate knowledge of the need, use and demand' for this product could not be a trade secret. It is something that would be learned in any productive industry, as are the 'material sources and costs . . . labor costs . . . the suppliers and accounts payable . . . customers and accounts receivable . . . and advertising methods and material.' " *Id.* Although the court was discussing a product in *Van Products, supra*, the principle is equally applicable to services. In the case at hand, Collincini's knowledge of contract renewal dates

and Fabricating Company, 419 Pa. 248, 213 A.2d 769 (1965); *See also Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy*, 415 Pa. 276, 203 A.2d 469 (1964).

Honeywell next insists that since Collincini frequented the racetrack for a year instead of taking another sales job, he failed to mitigate his damages as the law requires and thus should be barred from any recovery. This argument has no merit. Honeywell has misapprehended and misapplied the doctrine of mitigation of damages. It is axiomatic that the doctrine of mitigation of damages addresses the *amount* of damages to be awarded once liability has been established; it has no bearing whatsoever on the underlying determination of liability. Once the jury found Honeywell liable to Collincini for tortious interference with contractual relations, any alleged failure on Collincini's part to mitigate his loss of income damages only affected the amount of his compensatory damage award, and not his entitlement to it.

Finally, Honeywell contends that the trial court's failure to instruct the jury that punitive damages must bear a reasonable relationship to compensatory damages warrants a new trial. Honeywell's contention is contrary to Pennsylvania law. Our supreme court has stated:

> If the purpose of punitive damages is to punish a tortfeasor for outrageous conduct and to deter him or others from similar conduct, then a requirement of proportionality defeats that purpose. It is for this reason that the wealth of the tortfeasor is relevant. In making its determination, the jury has the function of weighing the conduct of the tortfeasor against the amount of damages which would deter such future conduct. In performing this duty, the

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was a result of his "general knowledge, skill and experience," *Van Products, supra*, in the field and resulted from nothing more than "the intimate knowledge of the need, use and demand" for the particular kind of service maintenance contract that both Honeywell and ATS sold. *Id.*

jury must weigh the intended harm against the tortfeasor's wealth.

Kirkbridge v. Lisbon Contractors, Inc., 521 Pa. 97, 103, 555 A.2d 800, 803 (1989). The jury heard evidence that from 1986 through 1988 Honeywell averaged six billion dollars in gross sales and a quarter of a billion dollars in net profit each year. Given Honeywell's substantial resources and the jury's determination that Honeywell intentionally interfered with Collincini's employment with ATS, we cannot say that the $400,000.00 in punitive damages should shock the trial court's sense of justice. *Kirkbridge, supra.*

Judgment affirmed.

APPENDIX B

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD 87-21264

Issue No. 136934

JOSEPH COLLINCINI,
Plaintiff[*s*],

versus

HONEYWELL, INC.,
Defendant[*s*].

OPINION and ORDER OF COURT

[Filed Nov. 15, 1990]

OPINION

RALPH H. SMITH, JR., J.

Plaintiff's complaint contains one count for tortuous interference with a contract and one count for defamation. The defendant answered this complaint and counter claimed for monies due and owing on a contract of employment. After trial each of the parties claims was submitted to the jury for its consideration and determination. The jury found for the plaintiff on the tortuous interference with a contract count and awarded him compensatory as well as punitive damages. On plaintiff's defamation count the jury found for the defendant. The jury decided in favor of the defendant on its claims for

monies owing by plaintiff under the terms of his employment contract with it. All parties filed post trial motions. These motions are now before the court for our decision.

I. Defendant's motion anent plaintiff's verdict on his tortuous interference with a contract claim.

A. Judgment not withstanding the verdict

Plaintiff, a former employee of defendant, obtained employment with ATS. During the course of his employment with ATS the defendant sent it letters which the plaintiff contends were done maliciously and with the specific intent of causing him to lose his job. [A copy of these letters are Appendix I hereto.] Shortly after the letters were sent by the defendant and received by ATS, plaintiff was fired.

1. Proximate cause.

It is defendant's contention that there is no evidence in the record from which the jury could have made a finding that the letters which the defendant admittedly sent to ATS were the proximate cause of his firing and subsequent harm. It makes this contention while conceding that there is evidence in the record that witness Relja testified that his superior told him to fire plaintiff and that the reason for his firing was the defendant's letters. This testimony of Mr. Relja, even though it was hearsay, went into the record without objection by defendant.

Defendant now contends that even though the Relja testimony is in the record it cannot support a finding of causation because it is not otherwise corroborated. With this contention we cannot agree.

Hearsay evidence offered and admitted without objection may be used for any purpose. Here, it can be used to support the bridge between the letters and conversations of defendant's and ATS's employee with the discharge of the plaintiff and his subsequent harm. The

Relja statement fits into place without corroboration but corroboration is not lacking. In the instant case there are positive facts giving life to inferences which can bridge the gap of causation. Defendant not only communicated with ATS by mail but it also engaged in conversation with its employee. These communications dealt with the plaintiff as an employee of ATS who was engaging in activities that could form the basis of a legal action between the defendant and ATS. Plaintiffs alleged conduct was stated to be a basis of a lawsuit between defendant and ATS. ATS was asked to see that such conduct ceased. This it did by firing plaintiff. These facts form a reasonable basis from which the jury could infer that it was defendant's intention in communicating with ATS to cause plaintiff's dismissal and that its effort was fruitful.

Moreover, it must be considered that ATS's employee, Judy Roberts, stated that ATS only considered firing plaintiff after it received the letters from defendant [T. 671] and that defendant's employee Tony Trifiletti stated "I think the letters helped." [T. 186-187].

The bridge of causation has been found by the jury to be in place. The jury's findings are justified by the record and should not be disturbed.

2. Defendant's letters.

It is defendant's contention that its letters, as a matter of law, were not tortuous. When we consider the record in order to rule on defendant's request for judgment not withstanding the verdict, we must view the evidence in a light most favorable to the plaintiff and draw all reasonable inferences therefrom in favor of the plaintiff. After doing this we do not agree with defendant's contention.

Defendant contends that the mere stating of an opinion is not sufficient upon which to base a verdict finding it tortuously interfered with plaintiff's contract with ATS.

This might be true if the letters were based upon true facts and were viewed separately. However, in the instant case there were not only the letters but also there were other communications between the defendant's employees and the those of ATS. The manner and nature of these communications were such that the jury could have found that the defendant, a much larger entity in the market place, was using its position to bring about plaintiff's termination with ATS. A threat—even a hint—of action against ATS by the defendant if plaintiff continued his cited conduct as an employee of ATS would be a sufficient basis for the jury to conclude that plaintiff should be fired. It was not the mere stating of an opinion that formed the foundation for the jury's verdict but rather the totality of the evidence. There was sufficient evidence from which the jury could have found that the defendant tortuously interfered with plaintiff's employment with ATS.

3. Doctrine of mitigation of damages as a barrier to recovery.

Defendant also contends that the plaintiff is barred from recovery because he failed to mitigate his damages. While we would certainly agree that the doctrine of mitigation of damages was applicable to the facts of this case, we are unable to agree that it bars his recovery.

Plaintiff was fired by ATS and he contends that from that moment he suffered damages one element of which was his loss of income. He was under a duty to himself to act reasonably to mitigate his damages. The jury was instructed on this doctrine and presumably complied with the court's instructions. The doctrine of mitigation goes not to the issue of liability but rather to the question of damages. Even if the jury were to find that plaintiff failed to mitigate his loss of income damages this would not have precluded it from arriving at a verdict in plaintiff's favor. Such a finding by the jury would merely go the amount of damages.

We recognize that plaintiff testified about looking for other work in such a way that the jury could have found that he was not acting reasonably. Maybe it made just such a finding and adjusted the verdict accordingly. Plaintiff did testify that for approximately a year he spent every day at the race tract for a long period of time gambling on the horses. In fact he reported a substantial income from this endeavor. The record dealing with plaintiff's efforts at mitigation of his damages would not, under the law, permit the entry of judgment in favor of the defendant.

B. New Trial

1. Court erred in disallowing Morris's testimony?

During the course of the trial, defendant indicated that it wished to take the deposition in the evening of Lee Morris. Plaintiff objected. Defendant did not list Mr. Morris as a witness in its pre-trial statement in accordance with this court's rule 212. That rule requires the disclosure of a witness' name in order that he or she might testify. No disclosure, no testimony the trial court ruled.

We do not find this ruling to be error. The prejudice which is inherently present when an undisclosed witness is brought forth to testify during trial, via a deposition in the evening, is obvious. It is unfair because it is not in keeping with the process due the other party according to the rule of this court. It does not allow for sufficient time to be prepared for either cross examination or contradiction.

2. Was there error in the trial court's charge?

Defendant contends and suggest as a basis for a new trial the charge of the court. The court, defendant contends should have instructed the jury that "honest persuasion based on truthful information cannot constitute 'improper' interference" so as to constitute tortuous

conduct. The absence of these words stated verbatim to the jury it contends was prejudicial and, ergo, reversible error necessitating the granting of a new trial. With this position we do not agree.

In reviewing the court's charge, the charge should be considered in its totality. If thus viewed the charge accurately and fairly instructs the jury on the law and the issues for its consideration then it is without error. In the instant case the court instructed the jury on the law of tortuous interference with a contractual relationship in detail. The jury was told about the plaintiff's burden of persuasion and what he must prove in order to make out his case. The court also instructed the jury on justification and what, under the law, the defendant may do without subjecting itself to liability. We find the charge to be accurate and fair.

3. Was the verdict contrary to the court's charge?

Defendant contends that the jury went contrary to the court's charge dealing with proximate cause. The court told the jury that there had to be a causal connection between the conduct of the defendant and the plaintiff's firing which caused him harm. Presumably the jury followed this instruction and, as we indicated in "A", *supra*, there was sufficient evidence from which it could have made this finding. For this reason, the jury acted properly.

4. Was the jury's verdict against the weight of the evidence?

Pennsylvania's appellate courts have admonished trial courts not to pay attention to 'boilerplate' reasons for post-trial relief such as this one of the defendant's. For this reason, we do not discuss it in detail. Suffice it to say, we have reviewed the record and found that there was sufficient evidence for the jury to consider. Having

considered—and thus weighed—the evidence in favor of the plaintiff it is not for us [regardless of how we might have determined it] to overturn the jury's verdict.

5. Remittitur re punitive damages.

The jury returned a verdict for compensatory damages in favor of the plaintiff in the sum of $100,000.00 and a verdict in favor of the plaintiff for punitive damages for $400,000.00. While we feel that the punitive damage verdict was extremely high, we cannot find that it does not bear some relationship to the verdict for compensatory damages and, for this reason, it must stand. We do not feel, under the circumstances of this case, that we should substitute our judgment for that of the jury and order a remittitur.

II. Plaintiff's motion for post-trial relief anent defamation claim.

Plaintiff requests this court to grant him a new trial on his defamation claim. We have examined the reasons to justfy such relief in plaintiff's motion, brief and in the record and find his claim to be totally lacking in merit.

III. Plaintiff's motion for post-trial relief anent defendant's verdict on its claim for breach of contract.

Plaintiff requests post-trial relief in the nature of a new trial on defendant's claim for money owed it in accordance with its employment agreement with the plaintiff. Defendant contended and plaintiff admitted that certain credits should be allowed defendant and that an accounting would be made periodically. Defendant demanded plaintiff to account and pay to it certain funds due and owing. This the plaintiff failed to do. The jury was more than justified, based upon the record, in returning the verdict that it did and the plaintiff has no legitimate basis for requesting a post-trial relief.

IV. In conclusion, the post-trial motions of the plaintiff and the defendant are without merit. Hence, the following order:

ORDER OF COURT

AND NOW, to-wit, this 15th day of November, 1990, it is hereby ORDERED, ADJUDGED and DECREED that the post-trial motions of the plaintiff and the defendant be and the same are hereby dismissed.

By the Court

/s/ Ralph H. Smith Jr.
J.

APPENDIX I

HONEYWELL

March 25, 1987

Mr. Robert E. Henning, President
American Technical Services, Inc.
4600 North Royal Atlanta Drive
Tucker, GA 30084

Re: Mr. Joseph Collincini

Dear Mr. Henning:

By letter of March 3, 1987 (copy attached) I informed you that ex-Honeywell employee, Joseph Collincini, while currently in your employ, has utilized unfair competitive practices to take away two Honeywell contracts (totalling $34,130.00).

On March 10, 1987, Ms. Judy Roberts of ATP called to request additional documentation which I read and sent to her, and to assure me that ATP will look into the matter.

Today Honeywell Industrial Services Division has reported two additional instances of Mr. Collincini's continuing wrongful interference with Honeywell contractual relations:

1. Greenwich Collieries Pennsylvania Mines (P.O. Box 351, Ebensburg, PA. 15931): Mr. Collincini approached this Honeywell customer based on his inside knowledge of the April 1, 1987 turnover date, underbid the Honeywell price (again based on knowledge gained as a Honeywell employee), and took the $10,500.00 contract away from Honeywell, to A. T. S.

2. Shenango China: Mr. Collincini, again utilizing knowledge gained while in Honeywell's employ, ap-

proached this Honeywell customer and underbid the existing Honeywell contract price.

Honeywell expects evidence of good faith action taken by ATS to end these practices immediately.

Very truly yours,

/s/ Judith Ungar
JUDITH UNGAR

JU/cs
Enclosures

cc: J. R. Kaminsky
J. Roberts
A. J. Trifiletti

HONEYWELL

March 3, 1987

Mr. Robert E. Henning, President
American Technical Services, Inc.
4600 North Royal Atlanta Drive
Tucker, GA 30084

RE: Mr. Joseph Collincini

Dear Mr. Henning:

Mr. Joseph Collincini was employed by Honeywell, Inc. (Honeywell) as an Industrial Services Division (ISD) Sales Representative in the Pittsburgh office at the time of his discharge in October, 1986. Mr. Collincini's position gave him access to trade secrets and other information which is highly proprietary and confidential to Honeywell. Such information includes, but is not limited to, the identity of Honeywell customers, their particular needs, contract prices and anniversary dates, and Honeywell estimating procedures. Such information was gathered and/or produced by Honeywell at considerable expense.

Mr. Collincini currently is an employee of American Technical Services, Inc. (ATS), operating out of the West Chester, Pennsylvania office. Mr. Collincini, as an agent of ATS, has been engaging in unfair competition against Honeywell and wrongful interference with Honeywell contractual relations with third party customers. Specifically, Mr. Collincini:

1. Has used Honeywell proprietary information to systematically call upon Honeywell customers in timely anticipation of their contract renewal.

2. Has used Honeywell proprietary information in order to underbid Honeywell's contract renewal prices.

3. Has caused, by using the unfair practices described above in 1. and 2., Honeywell to lose contract renewals with Cooper Energy ($20,000.00) and with Mercer, Lime and Stone ($14,130.00).

Honeywell is certain that ATS, as a responsible company, will investigate Mr. Collincini's actions and prevent their recurrence. Should such unfair practices continue, Honeywell will pursue its available legal remedies to the fullest extent.

I look forward to your response.

Very truly yours,

/s/ Judith Ungar
JUDITH UNGAR

cc: A. J. Trifiletti
J. R. Kaminsky
J. Collincini

APPENDIX C

THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

David A. Szewczak, Esquire
Prothonotary
Eleanor R. Valecko
Deputy Prothonotary

1015 Grant Building
Pittsburgh, Pa.
15219
(412) 565-7592

January 31, 1992

William A. Pietragallo, Esquire
13th Floor, One Oxford Centre
Pittsburgh, PA 15219

IN RE: Joseph Collincini v. Honeywell, Inc.
No. 476 Pittsburgh, 1991

Dear Mr. Pietragallo:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

"ORDER OF COURT

The court hereby denies the application filed December 10, 1991 requesting reargument or reconsideration of the decision dated November 26, 1991.

DATE: January 31, 1992

PER CURIAM"

Very truly yours,

/s/ Eleanor R. Valecko
Deputy Prothonotary

ERV:kks
cc. Vicki Kuftic Horne, Esquire
Honorable Ralph Smith, Jr.

APPENDIX D

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. GD 87-21264

JOSEPH COLLINCINI,

Plaintiff,

vs.

HONEYWELL, INC.,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that HONEYWELL, INC., Defendant above-named, hereby appeals to the Superior Court of Pennsylvania from the judgment entered in this matter on the 20th day of December, 1990 in favor of the Plaintiff against Honeywell, Inc. This judgment has been entered in the docket as evidenced by the attached copy of the docket entries.

PIETRAGALLO, BOSICK &
GORDON

By: /s/ William Pietragallo, II
WILLIAM PIETRAGALLO, II, ESQ.
Pa. I.D. # 16413

By: /s/ Pamelia G. Cochenour
PAMELA G. COCHENOUR, ESQ.
Pa. I.D. # 47761

Attorneys for Defendant,
Honeywell, Inc.
One Oxford Centre, 13th Flr.
Pittsburgh, PA 15219
(412) 263-2000

APPENDIX E

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary
Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219-2463
(412) 565-2816

June 9, 1992

William Pietragallo, Esquire
Pamela G. Cochenour, Esquire
One Oxford Centre, 38th Floor
Pittsburgh, PA 15219

In Re: Joseph Collincini v. Honeywell Inc.
No. 0116 W. D. Allocatur Docket 1992

Dear Mr. Pietragallo and Ms. Cochenour:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"June 9, 1992
Petition Denied
Per Curiam*

*Mr. Justice McDermott did not participate in the consideration or decision of this matter."

Very truly yours

/s/ Irma T. Gardner/CBS
Deputy Prothonotary

ITG:cs

cc: Paul A. Koches, Esquire
Joseph Brooks, Esquire
Vicki Kuftic Horne, Esquire
Hon. Ralph H. Smith, Jr.

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No. GD 87-21264

JOSEPH COLLINCINI,

Plaintiff,

vs.

HONEYWELL, INC.,

Defendant.

JURY TRIAL

Volume I

DATE: January 22-25, 1990

BEFORE: HON. RALPH H. SMITH, JR.

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* * * *

[TESTIMONY OF JOSEPH COLLINCINI]

[308] Q And on the profit or loss from business, Schedule C—

MS. HORNE: Excuse me, Your Honor.

Q —horse racetrack wagering is listed as the principal business or profession, including product or service. Is that correct?

A As I indicated, that was his jargon and not mine.

Q But you signed the tax return. Is that correct?

A Yes. And the reason, I believe Ms. Horne brought out, is the fact that I had no income. This is why he used this jargon, horse track wagering.

Q On prior tax returns you handled your gambling activities by just simply putting the winnings on the front sheet and then listing the amount wagered on an itemized deduction. Is that correct?

A I did what the tax accountant did, yes.

Q All these returns have been prepared with the tax accountant's help?

A Since 19—I believe '84 or '85.

Q But it does say horse racetrack wagering is your principal business or profession?

[309] A I am a sales rep, my profession, Mr. Potter. The jargon he put in—Again, I was using his expertise as an accountant in filling out my tax returns. That's what I hired him to do.

Q When you signed the tax return you knew what Schedule C said?

A I don't know, in fact, if I did. I really don't.

Q You might not have read it?

A I looked through the information. I don't remember seeing that part of it. I don't remember not seeing that part of it.

Q Let's look at that Schedule C. Do you have it in front of you?

A Yes.

Q The general framework of that Schedule C, it starts out with gross earnings, gross receipts or sales. Is that correct?

A Yes.

Q And the figure is $102,562?

A That is correct.

Q And I think there is a schedule attached that shows where the accountant got the figure of $102,000. Do you see that schedule?

A Yes.

* * * *

[316] Q Underneath it there is some columns. One says parking, and the next says admissions. Am I reading it correctly?

A Right.

Q Then there is the heading that says—It says RT miles. Do you see that?

A Yes.

Q All right. And under parking there is three lines that appear there. Right?

A Yes.

Q It looks like this, doesn't it? Do those numbers appear there?

A Yes, they do.

Q All right. If I add together the two 80s and the 100, I get 260.

A Okay.

Q I see. Meadows is the name of a racetrack, isn't it?

A Right.

Q And MTN is Mountaineer Park in West Virginia?

A Yes.

Q And TDN is Thistle Downs?

A Yes. That is correct

Q Is the correct interpretation of this schedule that you made 260 trips to a racetrack in 1989, and 100 of those [317] trips were made to the Meadows; 80 were made to Mountaineer Park in West Virginia; and 80 were made to Thistle Downs?

A That's probably correct information, yes.

Q Where did the 260 come from?

A I don't know.

Q Well, the accountant didn't know it, did he?

A I probably provided him with that information.

Q You told the accountant you went to a racetrack 260 times in 1989?

A I don't recollect what exactly I told him, Mr. Potter.

Q Okay. Then under RT miles these figures appear. Have I got the figures right?

A Yes.

Q That's round trip mileage, isn't it?

A Yes.

Q You have to drive 50 miles to get from your home to the Meadows and back?

A Yes, that's probably true.

Q You have to drive 100 miles to get down to Mountaineer Park in West Virginia and back?

A Yes.

Q 250 miles to get to Thistle Downs and back?

A Yes.

Q In the next column these numbers appear. Have I got [318] the numbers right?

A Yes, I believe that's right.

Q All right. Your accountant says you drove 5,000 miles getting to the Meadows and back, 8,000 miles getting to Mountaineer Park and back and 20,000 miles getting to Thistle Downs and back, all in one year. Is that correct?

A Yes.

Q And you drove 33,000 miles journeying to racetracks and back in one year?

A Yes. That's what the information says.

Q Then your accountant takes $.25½ per mile for 15,000 miles and he takes $.11 a mile for the remainder of 18,000 miles, and he calculates that you spent $3,825 going the first 15,000 and $1,980 going the second 18,000 miles, and that the total driving costs were $5,805 in 1989. Is that correct?

A I believe those were his figures, yes.

Q Then he takes the figure $5,805 and he puts it on the Schedule C as a business expense. Did you see that on Schedule C? It says travel, $5,805.

A Yes.

* * * *

[362] Q When you were an employee of ATS did you contact former customers that you had dealt with when you were at Honeywell?

A Yes.

Q Which ones did you contact?

A There were four, specifically. One was Mercer Lime and Stone, who I contacted based on my boss's suggestion, John Relja. Two, there was Cooper Energy in Grove City that John and I were working up there, again, on finding out who was doing the installation in this new part of the plant. The third one was Pennsylvania Mines, where, again, John and I were both in the Johnstown area, having no appointment in Pennsylvania Mines. We made initial contact there. The fourth, I believe, was Shenango China in New Castle.

* * * *

[401] Q Mr. Collincini, Cooper Energy, prior to signing up with ATS, had a contract with Honeywell?

A Yes.

Q And so, also, did Pennsylvania Mines?

A Yes.

Q And so also—

A Pennsylvania Mines had three contracts with Honeywell, of which there were three different anniversary dates, Mr. Potter.

Q All right. And Mercer Lime and Stone?

A Yes.

Q And at some point in time the customer went from Honeywell to ATS?

A Yes, they did.

Q And at the point of time that they went to ATS was there an overlap or was there a gap in the service coverage, or did they go from Honeywell to ATS at the expiration date of the Honeywell contract?

A I would say at the Cooper it went at the expiration date. The Pennsylvania Mines, there were two mines involved. When those anniversary dates—I do not know when they were. Mercer, I would say they probably went, yes, at the anniversary date.

* * * *

[406] Q You had Honeywell pricing information?

A I had Honeywell pricing information in the attempt to construct and price maintenance service contracts. That's all that it was. Yes.

Q When you were working at Honeywell you also knew the identity of the customers you dealt with?

A Of course. Yes, the customers that I dealt with, I knew their identity.

Q Did you have any documents, papers, Rolodex cards, index cards on which you wrote down information about contract renewal dates and the like?

A No, I did not. No, I did not.

Q You didn't have any notes like that at all?

A No, I did not.

Q Would you agree, Mr. Collinicini, that these three firms were former Honeywell customers?

A Yes.

Q That they were former Honeywell customers that you dealt with when you were at Honeywell?

A Yes.

Q Would you agree that you got maintenance contracts with them that started—with the exception you have been making about Pennsylvania Mines—that started at the [407] expiration date of the Honeywell contract?

A Okay. Yes.

Q Would you agree you were in contact with them—

A Yes.

Q —prior to the expiration date of the Honeywell contract?

A Again, I did not—Yes. Yes, Mr. Potter. To answer your question, yes.

* * * *

[451] Q Again, I did that calculation. From my calculation, from ten to 15 customers a week, would you see between 400 to 700 people in that year, or would you have seen—

A Yes.

Q Is that fair to say? 400 customers?

A Right.

Q You didn't get all of those as customers for Honeywell, did you?

A No, I did not.

Q But some of them you would get contracts on?

A Yes. I sold contracts in '86. Yes, I did.

Q Did you have ready access while—I guess you had access at the office to their renewal dates. Is that right?

A It was information, again, that was provided to the branch manager and operations manager. Again, it was the operations manager's responsibility to get the renewals.

Q At Pennsylvania—The three customers were brought up—I erased that, I guess—Pennsylvania Mines, Cooper Energy and Mercer Lime and Stone.

A Yes.

* * * *

[TESTIMONY OF ATS's FORMER PITTSBURGH BRANCH MANAGER]

[507] Q And, subsequently, after you terminated Joe Collincini, did you speak with Richard Timiny concerning the termination of Joe Collincini?

A Yes, I did.

Q You indicated he was your supervisor?

A Yes, he was.

Q Did he tell you—When did that occur?

A That happened in June of that year. We had a sales meeting in the regional office in West Chester, Pennsylvania.

Q And did you speak with him concerning the termination of Joseph Collincini?

A Yes, I did.

Q And did he tell you the reason at that time that you were made to terminate Joseph Collincini?

[508] A Yes. At that time he told me, in fact, that Honeywell wrote letters to the president, Mr. Hennig, and

they were putting pressure on him, and the easiest way out of his situation was to let Joe Collincini go.

MS. HORNE: I have nothing further, Your Honor. Thank you.

THE COURT: Is that Morris or Morrison?

THE WITNESS: Morris, i-s.

CROSS-EXAMINATION

* * * *

[TESTIMONY OF ATS's DIRECTOR OF HUMAN RESOURCES]

[645] Q Was it your understanding, by the letter of March 3, 1987, Honeywell was asking you to terminate Mr. Collincini?

A No, not at all.

Q I'm going to show you now what's marked as Defendant's Exhibit JJ and ask you to identify it, please.

A This is a follow-up letter that was sent to Bob Hennig by Judith Ungar, and it's dated March 25th. On March 25th Judith had not received any response from us, and she was writing as a follow-up, asking for some response, and also pointing out to us that there had been two additional incidents of Mr. Collincini contacting prior Honeywell customers.

Q And did Mr. Hennig pass that letter on to you as well?

A Yes, he did. And he asked me what I thought we should do about it. My comment back to him was—The only suggestion I could make was that, whether it be John Relja or Bruce Hawes, someone in a managerial position could talk to Mr. Collincini and explain to him that we did not want him using any proprietary information that he had as a result of being employed at Honeywell but [646] certainly did not have a problem with him contacting prospective customers for ATS. I

don't know whether any such discussion ever took place.

Q And why did such discussion never take place?

A I said I don't know whether it did.

Q Why didn't it?

A Why didn't it? We made a decision—I don't remember the exact date, but we made a decision during the month of March of 1987 to terminate Mr. Collincini's employment. The reason being the Pittsburgh office had not been a performing office from a profitability standpoint and had not been able to make any contribution to the corporation. We were even considering at that time shutting down the office, so we could not justify, from a cost/benefit standpoint, employing another salesman in that office.

Q In that time period, the early part of 1987, what was ATS's overall operation in terms of how many regions and how many branch offices?

A There were four regions. There was a southeastern region, headquartered in Atlanta. There was a northeastern region, headquartered in Philadelphia; a western region, headquartered in San Francisco; and a midwestern region, headquartered in Chicago. I do not recall the exact number of branch offices, but there [647] were branches under each of the four regions.

Q Did you call Judy Ungar to tell her of ATS's decision?

A Yes, I did, and I also followed that up with a letter.

Q I'm going to show you what's marked as Defendant's Exhibit PP and Defendant's Exhibit RR. Identify PP for us, please.

A PP appears to be a memo to the file that Judith Ungar wrote after my conversation with her. Do you want me to read this?

Q Let's ask you what you recall of the conversation.

A Okay. What I recall of the conversation is telling Judith Ungar that Mr. Collincini's employment had been terminated, that the reason for that termination was that the Pittsburgh office had been a poor performer from

a profitability standpoint and we could not employ an additional salesperson in that office. That's my recollection of what my conversation was with her.

Q And was that the correct, true reason for Mr. Collincini's being terminated?

A Yes, it was.

* * * *

[JANUARY 30, 1990, IN CHAMBERS]

[706] THE COURT: Well, for the record, I have affirmed Defendant's points and Plaintiff's points with the exception of 2, 3, 6, 7 and 11.

MS. HORNE: What? Plaintiff's?

THE COURT: Right, Plaintiff's 2, 3, 6, 7 and 11.

I do want to instruct counsel that I don't intend reading these points. And if I don't cover the gist of them during the course of my charge, you bring it to my attention after I am finished.

* * * *

[CHARGE TO THE JURY]

[773] THE COURT: Then we will try to get on with the charge. And, hopefully, I will be done, so you can have your lunch and then start the deliberations.

Members of the jury, you have been summoned from the general population to come into court and sit as jurors. And in this particular case you took an oath, and the oath basically states that you would well and truly try this case according to the law and the evidence and a just verdict [774] render.

As they say in the popular vernacular, what both sides want in this case is a just verdict. In other words, Plaintiff wants a just verdict; so does the Defendant. And it's your obligation to achieve this by applying the facts to the law.

Now, there is a split between the jury and the judge. The jury is the determiner of the facts. The judge has responsibility for determining the law and, once the judge

determines this, to tell you what it is and then to permit you to apply the facts, as you find them, to the law.

Now, members of the jury, in keeping with your function as judges of the facts, let me instruct you that if counsel has said anything to you that differs from your recollection of the facts, you should disregard what counsel has said. If I say anything to you that differs from your recollection of the facts, disregard what I say. Neither counsel's nor my recollection of the facts controls. It's your recollection, and your recollection alone, that should bring in the verdict.

Now, in this case, as in many cases, members [775] of the jury, there are many facts which, to me, appear not to be in dispute. And I would suggest to you that if you find that this is the case, that there are facts that have been testified to by believable witnesses or admitted by the parties, you should adopt them as the facts of the case.

Now, here we have the Plaintiff, who comes into court and said for 12 years, approximately, he was an employee of the Defendant. I don't think there is any dispute about it. I haven't heard the Defendant say that this is not so. In fact, I think the Defendant even admits it by presenting and discussing the various exhibits, which are the letters firing him from his position. And, again, I don't think there is any dispute that although Plaintiff was working for the Defendant, the Defendant terminated his services. You have the Plaintiff's contentions as well as the Defendant's to support this.

You will have for your consideration the letter of October 22nd, wherein he was told that his termination is effective on, I think, October 15th, 1986; and then there was another letter on the 29th, the same month and year, too, indicating [776] how they should or would like to have this resolved.

What I am trying to say is: You have the fact that Plaintiff is an individual. Defendant is a corporation. Plaintiff hired—or was hired by the Defendant, then was terminated by the Defendant.

I don't think that there is any dispute in the case that subsequent to the termination the Plaintiff was hired by ATS. He was hired. He was employed by them. He was in the Pittsburgh office. Plaintiff contends this, and I think the Defendant's position in the case also supports this, because they wrote letters to ATS talking about his employment. This isn't in dispute, if my recollection is correct. Again, let me hasten to add it's yours that controls.

I don't think there is any dispute that when Plaintiff was hired by the Defendant he signed an application. It's in evidence. I think paragarph three of the application—I may be wrong as to the number. But paragraph three is an undertaking by Plaintiff that he would not use proprietary property of the Defendant corporation other than in keeping with his employment by the Defendant [777] corporation. So these facts, to my recollection, are not disputed.

I don't think there is any dispute, members of the jury, that sometime in 1987 the Defendant wrote to ATS, requesting that they not permit the Plaintiff to use what they called trade secrets or proprietary materials in furtherance of his employment with ATS, and they asked that they see that he discontinue this. And, again, I think sometime later they also wrote another letter to ATS saying: Well, it's still continuing. What are you going to do about it? Plaintiff contends that these letters were written and received, and I think the Defendant corporation admits it.

On March 25th of '87 a letter was written to the Plaintiff, care of Mr. Relja, at ATS's box number in McKeesport, and the letter contained two previously written letters. I don't think this is in dispute.

See, there are facts that are not in dispute, at least according to my recollection. And I would suggest to you, although you are not bound by the suggestion, that whenever you find, members of the jury, facts that are not in dispute, that have been testified to by credible witnesses or

[778] admitted by the parties, then you adopt them as the facts of the case.

And then you are going to find some facts which will appear to be at odds ends, so to speak. You should, whenever possible, attempt to reconcile, as long as you don't have to give away to your finding as to the believability of those who testified regarding them.

Then, lastly, you will have facts which are in dispute, about which there is a difference and about which the inferences that the parties ask to be drawn are completely at odds end. This will require your important function of determining believability, who is telling the truth.

Now, when you come to determination of what evidence you will find and who you find to be believable, keep in mind that it's for you to weigh the evidence and for you to adopt it as you find it should be adopted.

The number of witnesses that are provided to you in the courtroom by one side or the other is not controlling. It's the weight of the believable evidence that should control your verdict.

Now I'm going to give you a few rules that [779] you may consider, if you wish, in order to arrive at a verdict. If you don't want to use them, don't use them. If you want to use some of them, use them.

But when you come to determine whether somebody is telling the truth, ask yourselves: Would the interest that person has in the outcome of the lawsuit or relationship to a party to the lawsuit affect his or her believability? Now, a person can have an interest in or a relationship to a party of the lawsuit and tell the truth as best they know it, but our courts have said that this is a factor that you, as jurors, may consider.

You may consider the fact of the Plaintiff's interest. You may consider the fact that the Defendant corporation has sent its employees here to testify, and they have an interest. They're employees of the Defendant, and the corporation can only function through its servants, agents and employees, so this is a fact.

Consider the manner and the demeanor of the witnesses. You had the opportunity to see the witnesses as they appeared in the courtroom and as they testified either in the witness stand or [780] through the television deposition. And based on nothing more than your observations, you can say I believe them or I disbelieve them.

If a witness has testified in a contradictory manner about a material fact, then you would be justified, unless some acceptable explanation was given for this conduct, in disregarding that witness's testimony. You can say you just can't tell two different stories about the same thing and expect to be believed.

Now, if a person testifies falsely and you find that it was an honest mistake and that you would disregard that which was mistakenly testified to, you may, if you wish, believe the balance of that witness's testimony.

However, if you find that it was deliberately falsified—in other words, a witness intentionally lied to you—then you would be justified in disregarding not only that which was intentionally lied about but all of that witness's testimony. These are some rules. Use them as you see fit.

Keep in mind, members of the jury, it's for you, and you alone, to determine the facts, then apply them to the law that I am about to give you, [781] so that we can have what everybody wants, and that is a just verdict.

Now, in this case the Plaintiff has brought an action against the Defendant, and in that action there are two separate causes of action: One for an intentional interference with the contractual relationship and the second one is referred to as an action for defamation.

Now, the Defendant has filed a counterclaim, in other words, filed an action against the Plaintiff, saying you owe us money on the two checks that you gave us which we couldn't negotiate; they were sent back not sufficient funds; and, also, you have cashed certain documents and have failed to account for the money, and you owe us for that.

The Defendant's, while they make these claims, have

also said: We owe you money for 16 days pay, and we are taking that off, and we are offsetting it.

So keep in mind there is Plaintiff's claim against the Defendant, Defendant's claim against the Plaintiff. And I will instruct you, members of the jury, that whenever anybody comes into court making a direct claim or asserting an [782] affirmative defense, that entity or that person has the burden of persuasion. In other words, they have the burden of convincing you by the fair weight or the preponderance of the evidence before they would be entitled to prevail on their claim or their assertion. Keep this in mind. Remember where the burdens lie.

Now, what do we mean by the fair weight of the evidence? If you can, envision a scale with the pans of the scale evenly balanced. And you start out by placing on those pans the evidence for the Plaintiff, the evidence for the Defendant. And the scales, if they remain equally balanced—or the pans, or if they tip in favor of the person against whom the claim is made, then the burden hasn't been met. But if the scales tip, however slightly, in favor of the person who is making a claim or an assertion, then that person has met his or her burden, and it would be entitled to prevail on his or its claim.

Now I will discuss with you, members of the jury, the Plaintiff's claims first. Plaintiff's claims are based on two separate actions. Let me discuss with you the intentional interference with a contract.

[783] Plaintiff in this case, members of the jury, has come into court saying that the Defendant has intentionally and without justification interfered with a contract that he had with ATS and that because of this interference he lost his job and he suffered financial injury. He is asking for redress.

Now, it is the law of Pennsylvania that if a person intentionally interferes without justification with a contract between two parties, then that person is responsible for the injuries which would naturally and normally flow from the interference.

Now, in this case it's Plaintiff's contention that the Defendant, acting through its employees, wrote a letter to the ATS CEO—I guess he was the president of ATS—in which it made certain statements and that they did it with the intention—the deliberate intention of interfering with the employment contract Plaintiff had with ATS.

Now, you will take with you to the jury room this letter. Now I'm talking about the first letter that was written in '87. In that letter they said they had certain proprietary rights, certain information; there were certain trade [784] secrets and that this knowledge or the knowledge of these trade secrets and proprietary information was known to the Plaintiff, and he was using it in order to damage them by taking away their customers.

And I think they say this knowledge was that he knew who the customers were, when the contracts were going to be renewed, how the Defendant would price the renewal. He was aware of the method and the technique that was peculiar, I guess, to the Defendant for determining the price that it would charge, and this gave him an undue advantage. In other words, he could come in; he could underbid the Defendant, for example.

Now, you consider this: Was the letter written in order to intentionally interfere with this employment contract between the Plaintiff and the Defendant, or was it written in furtherance of a legitimate and reasonable purpose on behalf of the Defendant, because if it was, then it would be justified and the Plaintiff can't recover?

Now, you consider this, the first letter, as well as the second under the same legal principles. But the contention of the Defendants or the Defendant is that: Yes, we wrote the [785] letters. There is no question about that. And, yes, we had phone conversations between one of our staff attorneys and the director of human resources with ATS. But the purpose wasn't to injure or interfere with or to bring about the termination of the employment contract. Merely, it was to protect those interests which we had a legitimate right to protect as a result of the understand-

ing which we had with the Plaintiff when he signed the application for employment, and that is that he wouldn't use any proprietary materials except in furtherance of the Defendant's business. You consider these.

But if you find for the Defendant on this question, you shouldn't even consider the question of damages; but if you find for the Plaintiff, then, members of the jury, you should consider the damages that would flow from the injuries.

I would tell you, members of the jury, that you could consider the loss of benefits of the contractual relationship. In other words, what did the Plaintiff lose by not being—or not continuing in the employment of ATS? You can consider other pecuniary losses suffered by the Plaintiff as a result of the Defendant's acts.

[786] And you also may consider any emotional distress and harm to the Plaintiff's reputation suffered by the Plaintiff as a result of the Defendant's act. Consider the question of damages.

In this case Plaintiff says he was fired; he was fired because of an intentional act of the Defendant, and he lost his income. He said and states that he still hasn't been able to get back the income to the level that he had, and he is asking that you give him compensation for this.

Now, Defendant doesn't agree with this. Defendant doesn't agree that he has been injured, and he says one thing: He was certainly not fired because of anything they did. And they have offered evidence to indicate that and in support of their contention, or its contention, that the Plaintiff was let go because of the lack of business or failure of—or for business reasons.

And they have offered the testimony of the director of human services, who indicated that the business was going downhill. This wasn't anything to do with the Plaintiff, as an employee, but this was one office out of some 50-some offices that were closed down or in the process of closing [787] down, and it resulted in the dismissal of the Plaintiff. And I think the Defendant even

pointed out that the Plaintiff, when he went to file his unemployment comp claim, that he said the reason for separation was lack of business.

Consider this: We have heard and there has been offered into evidence, presented in evidence, testimony regarding the fact that the Plaintiff wagered. This you may consider only in light of the damages in the case. The Plaintiff was under a duty to himself to reduce his damages, in other words, to act as a reasonable person would act in order to lessen his damages, which means he should look for some employment.

Now, the employment doesn't have to be anything that would be substantially different from that which he had before, but it has to be something. He just can't, for the rest of his life, sit by and say look at my damages piling up.

And the Defendants contend he didn't mitigate his damages; he didn't try to lessen his harm. And Defendant has the burden of proving this to you. But consider their contention, because to the extent that he didn't act reasonably to lessen his damages, he is not entitled to compensation.

[788] Well, now, the second cause of action that the Plaintiff is setting forth is one of defamation. In other words, the Defendant is contending—or Plaintiff is contending that the letter of March 25th, addressed to him, care of Mr. Relja, was a defamatory statement, caused him an injury. And he is asking for recovery at your hands.

Now, members of the jury, in Pennsylvania, before the Plaintiff may recover he has to show that there was a—the statement was a defamatory statement; it was of a defamatory character. And by this we mean it must be a statement which would hold him up to ridicule or scorn or to lessen him in the eyes of those who received the statement, either in his personal way or in his business way or in his employment way. And he contends that this letter, plus the two attached letters, were such

that they were defamatory. They lessened him in the eyes of the reader, Mr. Relja. They held him up to ridiclude and scorn; and, therefore, were defamatory. Well, you consider it.

Now, the second thing must be that there was a publication by the Defendant. In other words, the Defendant must have made a publication of this [789] defamatory statement. Defendant contends, and I think the Plaintiff agrees, that the letter was addressed to him, but it was in care of Mr. Relja. And a letter written to a person who says it was defamatory is not a publication. In other words, it has to be a third person.

So unless you find that it was reasonably foreseeable when the Defendant mailed this letter to the Plaintiff, in care of Mr. Relja, that Mr. Relja would receive it, open it and read it, then there is no publication. But if you do find that it was reasonably foreseeable at the time the Defendant mailed the letter that it may be received by Mr. Relja or someone else, opened, read, then this is sufficient to constitute a publication.

Third, it has to apply to the Plaintiff, and by this we mean statements in the letter. I don't think there is much doubt about this. The Plaintiff contends what was said in the letter was referring to him. The Defendant admits that's the reason I wrote it.

Fourth, it has to be the understanding of the recipient of the letter that it had a defamatory meaning. In other words, Mr. Relja, when he [790] received the letter, when he read it, he must have had the understanding that this was defamatory within the meaning of defamation as I have given it to you. You heard his testimony and what he thought about when he got it, so you consider that.

And you have got to consider, members of the jury, whether there was a special harm resulting to the Plaintiff from this publication. In other words, was he harmed? Well, he contends this is part of the things that went together to cause him to be fired, cause him to be held in less esteem by his immediate superior.

And there was to be abuse of a conditionally privileged communication. In other words, did the Defendant abuse the privilege it had to write to the Plaintiff by writing to him and attaching these letters and then sending a copy and sending it in care of his superior. Well, you consider that.

Now, the defenses to this action are the burden of the Defendant, but they are absolute defenses. Truth is a defense. If you find what was said in the letters, considering the time frames in which they were mailed, in which they [791] were sent and which they referred to, were true, then there is no defamation, because you can't defame somebody by telling the truth about him.

And, also, the Defendant contends and has the burden of proving that they had a privilege in this and they had a right to write to their former employee, telling him that he has certain obligations which they feel are owed to it and that he should live up to it. You consider it. Consider the whole thing.

If you find that the Plaintiff was defamed, then he should receive a verdict at your hands. Otherwise, the verdict should be brought in for the Defendant.

Now, the damages in the defamation suit are those damages which would normally flow from the defamation itself. In other words, what harm did it cause the Plaintiff? Did this have something to do with his employment? Did he lose his job? Was he held in less esteem by his superior, Mr. Relja? Because as far as I can recall—and I could be wrong—Mr. Relja is the only one that we know that read the letter. I think he did testify that he sent it off to some other person, but there is no evidence that the other person [792] received it or read it and what he felt about it. So ask yourself, if you find for the Plaintiff, how much damage was done to him because Mr. Relja read the letter.

These are the two causes of action of Plaintiff.

The Defendant's contentions, members of the jury, are: One, they want to be made whole on the two checks that

are NSF. I think they total $500 and some. Also, they want back the money that the Plaintiff got on his expense —There is a name for these things—on his expense voucher and hasn't accounted for, paid back, less what they deducted for the 16 days pay that they owed him. They are asking that you give a verdict for it, and I forget what—$1,800, some amount. Again, it's your recollection that controls.

So consider the Defendant's contention along with the Plaintiff's contention and response to it. And then, members of the jury, if you can, arrive at that which everybody is looking for, the just verdict.

Now, before you can arrive at and reach a verdict in this case, ten out of 12 jurors must consciously agree to the verdict. You can't bring [793] in a verdict that represents the views of a majority. It has to be at least ten of the 12. Now, there is nothing wrong if 11 of you agree or 12 of you agree, but it's absolutely essential that ten of you agree.

Your verdict must be based upon the facts as you find them and the law as I have instructed you. It should reflect neither sympathy nor prejudice.

In this case you have the possibility of several verdicts. There may be even more. You will take with you to the jury room two verdict slips. The first one is the verdict slip in the case in which Joseph Collincini is the Plaintiff and Honeywell, Inc., is the Defendant. In this claim you have a possibility of two verdicts. You can find a verdict in favor of the Plaintiff and against the Defendant, in which event you would put on the verdict slip you find in favor of the Plaintiff and against the Defendant in the sum of—or you can find a verdict in favor of the Defendant and against the Plaintiff.

Now, members of the jury, if you find in favor of the Plaintiff on the intentional interference with a contract cause of action, then [794] I am going to ask that you consider another item, not of compensatory damages but

rather of what we sometimes refer to as hurt damages or punitive damages.

If you find for the Plaintiff on that cause of action, then I am going to ask that you consider and make a determination: Did the Defendant in an intentional manner, without due regard to the rights of other persons, in an egregious manner, perform the facts essential to make out the Plaintiff's cause of action? Because if they did, then you may consider—You don't have to consider awarding punitive damages, but you may consider awarding them. And punitive damages, members of the jury, are damages that are awarded not to make somebody whole—That's what compensatory damages are for—but to hurt somebody.

The law says if you find they acted so grievously of the social results of their own conduct, were so intentionally acting without regard to the rights of others, then you can hurt them. And to this end you've heard the net worth of the Defendant and its earning capacity. You may consider this because to hurt them you will [795] have to give an award that has some relationship to their total net worth.

Plaintiff contends punitive damages should be applied in this case, that you should award them. Defendant says no, that this isn't a case for that; we did nothing that we thought was improper, nothing that was intentionally done to harm them, only that which we were justified in doing in protecting our own proprietary rights. You consider that but only with regard to that cause of action.

If you find punitive damages, list them separately, say we find punitive damages for the Plaintiff in the sum of —. If you don't find punitive damages, of course, then you don't consider that.

Now, I have indicated that in the claim of Mr. Collincini you can find for him or the Defendant. And then in the claim of Honeywell, Inc., against Joseph Collincini, you have the possibility of two verdicts: one for the Plaintiff in the sum of—whatever sum you find to be

appropriate and against the Defendant or a verdict in favor of the Defendant against the Plaintiff.

[796] You also can bring—I should note, I guess, that you could bring in a verdict for the Claimants in both cases without being inconsistent, although I'm not indicating that's something you should do.

Once you have decided your verdict and have put it on the verdict slip, then, Mr. Ransom, as foreperson, as Juror Number One, foreman of the jury, you should sign at the place indicated for the foreman's signature.

Did you have any comments, suggestions or criticism?

MR. POTTER: Could we come to sidebar.

THE COURT: Yes.

(Discussion held at sidebar as follows:)

MR. POTTER: Do you have my requested jury instructions, the Defendant's?

MS. HORNE: I didn't bring yours up.

* * * *

[POST-CHARGE DISCUSSION AT SIDEBAR]

[798] THE COURT: Okay. Is that all?

MR. POTTER: 14.

THE COURT: I don't know if that's essential. Any other point?

MR. POTTER: My final one is interest prejudgment in a contract case.

THE COURT: Can't I award it?

MR. POTTER: You could.

THE COURT: I can. It saves a lot of problems.

MR. POTTER: You can hold it.

MS. HORNE: Your Honor, I would ask for the punitive damages. You obviously assumed Plaintiff is not due punitive damages on defamation.

* * * *

APPENDIX G

Date:	February 24, 1987
Subject:	Former Employees/Unfair Competition: J. Collincini and J. Raitz
To:	A. J. Trifiletti
From:	J. Ungar
Organization:	OGC
HED:	NJ13
MS:	
HVN:	(201) 882-4875

cc: J. R. Kaminsky

I have consulted with D. Andrews, Senior Counsel, Honeywell OGC, Waltham, Massachusetts, regarding the above two matters. The biggest problem which he perceives is a gap between the wrongdoings and their provability in court. He raises the following potential difficulties of proof:

1. Need for exact dates when former employees (FE hereafter) called upon Honeywell customers and when solicitation occurred.

2. Evidence of FE showing up on the basis of inside knowledge.

3. Witnesses: who will testify; Honeywell customers? Former customers?

4. Prices: what was quoted?

Generally, where there was no Agreement not to compete, and no egregious theft of documents, it is difficult to prove that information used by FE has protected status under the law. If there had been a premature cancella-

tion of a Honeywell contract, followed by a contract with FE's new employer, there possibly could be a separate ground for action.

If Honeywell can prove certain attributes of its business, and certain characteristics typical of competition for this business by FE, some states' courts will afford protection (usually in the form of injunctive relief which prohibits further such acts by FE). Among the attributes and characteristics are:

1. A unique customer base that cannot be identified except by Honeywell and which was obtained at considerable expense;

2. A "cherry picking" operation of profitable customers from that base using Honeywell information and confidential relationships;

3. The operation interferes with what would otherwise be a continuous relationship between the customer and Honeywell;

4. The extremely detrimental effect to Honeywell's business if FE were entitled to compete using Honeywell information; and

5. The fact that there is an almost unlimited number of customers a former employee would be free to contact even if he were enjoined from contacting Honeywell IMS customers.

Enclosed is a questionnaire which may help in gathering necessary information in future cases, and a sample of the type of letter which is used for FE who signed Honeywell employment applications explicitly prohibiting unfairly competitive activities.

Regarding J. Collincini: I recommend that our office send a letter (draft enclosed) to his new employer. Please indicate whether Mercer, Lime and Stone was lost to Honeywell, as well as provide any additional facts

solicited by the questionnaire. Mr. Andrews does not feel that the amount of information we currently have warrants the expense of presenting the matter to outside counsel with a view to possible litigation. (Our office will deal separately and directly with J. Collincini regarding the money he owes Honeywell.)

Regarding J. Raitz: I recommend that our office send him a letter (draft enclosed), incorporating any additional information which you may provide. Do you have further knowledge of his subcontracting work with Jay Instruments?

Please inform me what you think.

Regards,

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 92-181

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HONEYWELL, INC.,

Petitioner,

v.

JOSEPH COLLINCINI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VICKI KUFTIC HORNE*
SCHUCHERT HORNE, P.C.
Eighteen East
One Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 645-3000
Firm No. 740

Counsel for Respondent Joseph Collincini

*Counsel of Record

August 26, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

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COUNTER STATEMENT OF THE CASE

Joseph Collincini was employed with Honeywell, Inc. from June 1974 to October 1986, a period in excess of twelve (12) years. He did *not* hold a management position; he was a salesman in Honeywell's Industrial Services Division and in that capacity sold maintenance service contracts for industrial instrumentation. In the year that Mr. Collincini was terminated, one-third of the staff of the Pittsburgh Office of Honeywell was either retired, terminated or reassigned. Joseph Collincini was one of the individuals terminated.

After his termination from Honeywell, Mr. Collincini sought other employment and, within a month, was hired by American Technical Services (ATS). He was hired as a salesman in their Pittsb rgh Office. When Mr. Collincini became employed by ATS, his immediate Supervisor was John Relja. Testimony elicited at trial indicated that the sales focus of ATS in the Pittsburgh area was very different from that of Honeywell. Honeywell primarily sold third party contract maintenance programs; on the other hand, ATS focused on providing direct engineer/technician installation services, in purchasing functions, and in installation, calibration and start up functions. Those were all services that were not provided by Honeywell. Only a very small portion of the business of ATS was the selling of service maintenance contracts and to that extent, Mr. Relja testified that the sales of ATS overlapped with Honeywell.

While employed with Honeywell, Collincini's territory encompassed a 100 mile radius of Pittsburgh. Collincini had testified that during his twleve years with Honeywell, he had developed his own territory and his own customer base by "chasing smokestacks."

Not only Mr. Collincini but even the Branch Manager for Honeywell, as-on-cross examination, indicated that the service contract pricing information was a matter of general employment knowledge. John Relja, a witness for Plaintiff, had worked for companies in direct competition with Honeywell. Mr. Relja testified that salesmen within the industry knew the contracts held by their competitors including pricing and customer information and contract renewal dates. None of this information reflected anything more than the "general knowledge" that Collincini acquired during his twelve years as a salesman.

Honeywell learned that Mr. Collincini had obtained employment with ATS. It then systematically engaged in conduct aimed at accomplishing the termination of Collincini from ATS.

First, Honeywell searched for any evidence of a non-compete agreement between itself and Collincini. Finding none, its legal counsel made a thorough review of corporate policy and practice statements to determine whether any could be applied to Mr. Collincini. None were found.

An investigation was then conducted of ATS. Honeywell considered having a Dun and Bradstreet report completed to identify the net worth of ATS. It did learn that ATS was a very small company and was experiencing financial difficulties.

Legal counsel in Pennsylvania was then contacted. It was their conclusion that Honeywell was likely not entitled to any protection under the law. Legal counsel for Honeywell then determined that there was not a basis for litigation.

No effort was made to contact Joseph Collincini directly. Honeywell simply engaged in a system of direct contact with the new employer of Mr. Collincini, ATS.

Although it determined that it had no basis for litigation against Mr. Collincini, Honeywell wrote a letter dated March 3, 1987 and directed to Robert E. Henning, President of ATS, suggesting that it intended to pursue legal remedies against ATS. This was done immediately after Honeywell confirmed that they had no legal remedies.

That letter was followed by telephone conversations between Judith Unger, the legal counsel for Honeywell

and Judy Roberts, an employee of ATS. During these conversations and correspondence, Ms. Unger represented to ATS that she was acting in a legal capacity and that she had an enforceable legal interest under Pennsylvania law. The ATS employee, Ms. Roberts, had no information to disabuse her of that notion.

Within a week of sending the first letter to ATS, a second letter was sent by Honeywell, including a copy of the original employment application of Joseph Collincini. Within two weeks, a third letter was sent to ATS by date of March 25, 1987 and in which Honeywell put pressure on ATS to terminate Joseph Collincini. Although Honeywell clearly had a correct address for Mr. Collincini, it sent another letter directed to Joseph Collincini at the Pittsburgh Office of ATS and "in care of" John Relja, Mr. Collincini's superior. Not only was that a personal letter to Mr. Collincini in which they maintained that he had "bounced" checks and cashed travel letters without authorization, but it also attached additional copies of prior correspondence that Honeywell had with Mr. Collincini which indicated that Collincini's employment had been terminated based upon his "abandonment of position;" that he had failed to report in; that they would contact proper authorities because he had failed to turn in his company car; and otherwise suggesting that Mr. Collincini was an untrustworthy and bad employee.[1]

Mr. Relja confirmed that it was he, and not Joseph Collincini who received that correspondence. This nasty business was sent to "the care of" Mr. Relja, although Honeywell knew the address of Mr. Collincini having only two weeks before sent correspondence to his correct address.

---

[1] In its Petition to this Court, Honeywell fails to include in its Appendix this further correspondence which it directed to ATS.

Mr. Relja was sufficiently upset about the matter to call Judith Ungar, in house legal counsel for Honeywell, directly. Her response to his telephone contact, by her own notes, indicates the intent of Honeywell in sending that correspondence. Her note of contact indicated as follows:

> 3/30/87
> 1:30 P.M.
>
> A very indignant Mr. Relja called collect. he is angry that he had to go to P.O. to sign for letter to J. Collincini. I apologized that he was req'd to sign for it and told him it wouldn't happen again. (***grovel grovel.***)
>
> He thinks the Alice St. address shld wk. (***more groveling***).
>
> (I told him Ms. Roberts suggested that I use c/o J. Relja).
>
> He claims that J. Collincini's name was *not* on the envelope. (?!)
> (Emphasis supplied.)

Ms. Unger then followed up this conversation with Mr. Relja with another telephone call to Judy Roberts at ATS.

It was after this correspondence was sent that Honeywell, through Ms. Unger, received a telephone call from Judith Roberts of ATS to advise that ATS had terminated Joseph Collincini. That termination occurred on April 2, 1987, less than one month after the various correspondence and telephone calls between Honeywell and ATS commenced and within a few days of Honeywell's last correspondence to ATS. That termination occurred even though John Relja testified that as the Supervisor for Joseph Collincini, he vehemently objected to the termination of Mr. Collincini. He had received a telephone call in which he was told to fire Joseph Collincini

because of the pressure that Honeywell had been putting on ATS. ATS simply found that it was the easiest way to get out of an uncomfortable situation.

Anthony Trifiletti, the manager of Staffing Development and Employee Relations at Honeywell sent a memo to the "who's who" of Honeywell as follows:

> I learned today, through our corporate attorney, Judith Unger, that Collincini has been terminated from ATS. The reason given by the ATS H.R. manager was performance and not our letters. However, *I feel the letters helped*; the Human Relations manager obviously felt *compelled* to call Judith Unger to inform her of his termination. (Emphasis supplied).

The defense in this case was that Collincini was terminated for financial reasons by ATS and not because of the activities of Honeywell. Even in attempting to prove that defense, Honeywell simply clarified the influence that it had on ATS. At trial, Honeywell, produced a federal express envelope purportedly containing the personnel file of John Relja from ATS. That file had been obtained without the consent of John Relja and without any subpoena. What was found when that envelope was opened was a note inserted by ATS advising the counsel for Honeywell:

> "I need a release for this stuff. You and Honeywell owe us a dinner next time you are in Atlanta".

That file did not provide evidence of the defense that Honeywell was seeking.

In addition, an ATS employee called by Honeywell in its case confirmed that ATS had given no thought to terminating Joseph Collincini until they began receiving correspondence from Honeywell.

There were more than sufficient facts introduced at trial for the jury to conclude that it was the pressure exerted by Honeywell which caused ATS to terminate Joseph Collincini. It was the threat of legal action when Honeywell knew it had no basis for taking legal action; it was intentionally misdirected correspondence personal to Joseph Collincini without any privilege to do so; and it was the pressure placed by a much larger company on a financially troubled one which caused the termination of Joseph Collincini. The termination of Joseph Collincini had nothing to do with efforts by Honeywell to convey truthful information; malice was the reason. Honeywell did much more than convey information; the jury so found and properly awarded consequential damages of $100,000.00 and punitive damages of $400,000.00 as a message to deter future such conduct by Honeywell.

REASONS FOR DENYING THE WRIT

I.

PENNSYLVANIA STATE LAW WAS PROPERLY APPLIED WHERE THIS CASE INVOLVED NEITHER A PUBLIC FIGURE NOR A MATTER OF PUBLIC CONCERN.

In the instant case, analysis of the tort of Intentional Interference with Contract Relations was accomplished with reference to Pennsylvania Law and the Restatement of Torts, Second, §766 which identifies the elements of the tort of Intentional Interference with Contract Relations. Honeywell has attempted to circumvent the appropriate application of State Law to this case by a convoluted process that involves (1) transposing the elements of a defamation action to the tort of Intentional Interference with Business Relations; and (2) relies upon holdings of this Court in cases which are clearly distinguished in that they involve either public figures or issues or matters of public concern. As this Court in *Dun and Bradstreet, Inc. v. Green Moss Builder, Inc.*, 472 U.S. 749 (1985) explained, "we have long recognized that not all speeches are of equal First Amendment importance. It is speech on 'matters of public conern' that is 'at the heart of the First Amendment's protection' (cites omitted) . . . in contrast, speech on matters of purely private concern is of less First Amendment concern." (citations omitted).

That analysis of the First Amendment interest was done in the context of a consideration of Libel Law, not the tort of Intentional Interference with Contract Relations. Honeywell has cited to no decision of this Court which applied the First Amendment to the tort of Intentional Interference with Contract Relations. Further, its suggestion that the decision of the Pennsylvania

Appellate Courts in this case is in conflict with decisions of two United States Courts of Appeal is misplaced. The two cases relied upon by Honeywell, *Redco Corp. v. CBS, Inc.*, 758 S.2d 970 (3d Cir.), cert. denied 474 U.S. 843 (1985) and *Henderson v. Times Mirror Company*, 669 F. Supp. 356 (D. Colo. 1987) aff'd without opinion, 876 F.2d 108 (10th Cir. 1989) are not inconsistent. In both cases, defamatory communications were the sole basis for the intentional interference claim. If there was no defamatory communication, then there was no improper conduct which could be at the basis of the Intentional Interference claim.

In the present case, the claim of defamatory communications was only one element of the improper conduct which occurred. It was not the sole improper conduct. Honeywell is seeking to have this Court look at individual communications in isolation; that type of analysis completely ignores the actual elements of the tort of Intentional Interference with Contract Relations. That analysis would also ignore the circumstances of this case which revolved around an entire course of conduct of Honeywell which was improper and which resulted in the termination of Collincini from ATS.

In addition, the conduct of Honeywell was much more than simply the rendition of statements of "opinion." As Honeywell has conceded, in *Milkovich v. Lorain Journal Company*, 110 S.Ct. 2695, this Court declined to find an additional separate Constitutional privilege for "opinions". *Milkovich*, 110 S.Ct. at 2707. Once again, that decision was rendered in the context of a defamation action. As the Court noted:

> "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect

> or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement 'in my opinion, Jones is a liar,' can cause as much damage to reputation as the statement 'Jones is a liar.' As Judge Friendly aptly stated: '[it] would be destructive of the Law of Libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words "I think" ' ". (citation omitted)

This is consistent with Restatement Law which was at the foundation of the State Court analysis here. The Restatement (Second) Torts (1979), §767, identifies the factors to be considered in determining whether Intentional Interference is improper. The Restatement in §767 explains:

> The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does . . . the propriety is determined in the light of all the factors present. Restatement (Second) Torts, §767 (1979), comment on clause A.

In that context, the Restatement explains that a representation may be fraudulent "when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipients." *Id.*

The Restatement further addresses the circumstances where a party has threatened litigation such as was done by Honeywell. Restatement commentators explained "the use of these weapons of inducement is ordinarily wrongful if the actor has no belief in the merits of the litigation or if, while having some belief in its merit, he

nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass third parties and not to bring his claim to definitive adjudication." *Id.*

This case does not involve a consideration of an expression of opinion. Part of the analysis was whether Honeywell had determined that it did not have a truly legally enforcable interest yet had commenced contact with ATS, with the force of its legal department behind it and with the intent of convincing ATS that it intended to pursue legal remedies. It was not expression of opinion in this case but the conduct of Honeywell which gave rise to the Judgment. It was that conduct taken as a whole which was improper and which served as the basis for the verdict.

Finally, the conclusion that the Superior Court reached that the "characterization of the information Collincini relied on to obtain those contracts as proprietary or trade secrets is false as a matter of law" was simply consistent with the evidence as it developed during the course of the trial. The fact is, Honeywell was not able to establish that Collincini was in the possession of information which rose to the level of either trade secrets or proprietary information. The Court simply acknowledged that Honeywell's efforts to assert that claim did not make that assertion true. That conclusion is not only a matter determined pursuant to an analysis of State law, but is also consistent with the analysis of this Supreme Court in *Milkovich*. More significantly, we are neither dealing with a public figure nor a matter of public concern that would give rise to the type of Constitutional protection Honeywell is reaching for in this case.

II.
THIS CASE INVOLVES DETERMINATIONS OF PURELY STATE LAW THAT ARE NOT SUBJECT TO REVIEW BY THE UNITED STATES SUPREME COURT.

For the first time in the United States Supreme Court, Honeywell maintains that the issues in this case involve a consideration of the application of the First Amendment of the United States Constitution. That is both a misrepresentation of the nature of this case and of the issues addressed before the state trial court and appellate courts. Honeywell has utilized a sleight of hand to attempt to transpose an issue that clearly involves the interpretation of state law into one which implicates Federal Constitutional standards.

This Court has previously definitively held that it has no authority to review state determinations of purely state law. In fact, this court has further held that it will not review Federal issues that can have no effect on the State Court's judgment. *International Longshoreman's Association, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) (Citations omitted).

This Court has also stated "it is well settled that this Court will not review a final judgment of a State Court unless 'the record as a whole shows either expressly or by clear implication that the Federal claim was adequately presented in the State system.' " *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); citing *Webb v. Webb*, 451 U.S. 493, 496-497 (1981).

In analyzing whether a Federal claim has been adequately presented in the State system this Court in *Board of Directors of Rotary International* held, with reference to prior decisions of the U.S. Supreme Court "when 'the

highest State Court has failed to pass upon a Federal question it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this court can affirmatively show the contrary.' " Id.

In *Board of Directors of Rotary International,* the Court further noted that a casual reference to a Federal case, in the midst of an unrelated argument, *is not sufficient* to inform a State Court that it has been presented with a claim subject to the Appellate jurisdiction of the United States Supreme Court. *Board of Directors of Rotary International,* Id. at footnote 9. The issue raised before the trial court, as identified by the Honorable Ralph H. Smith, Jr., in his opinion was as follows:

> The Court, defendant contends, should have instructed the jury that "honest persuasion based on truthful information cannot constitute 'improper' interference" so as to constitute tortuous (sic) conduct. The absence of these words stated verbatim to the jury it contends was prejudicial and, ergo, reversible error necessitating the granting of a new trial. . . .

Order and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania filed November 15, 1990 (Appendix B of the Petition for Writ of Certiorari).

The Trial Court understood that point of error to relate to the charge of the court and analyzed that claim of error solely on the basis of State Law. There is no reference to Federal Law, there is no reference to the First Amendment, and there is no indication that Federal issues have been implicated.

Before the Superior Court of Pennsylvania, Honeywell had broken down that claim of error into two separate issues, as identified by that court:

> 1. Whether letters, containing true statements of fact and an opinion based on those facts, written to Appellee's employer, can constitute tortious conduct on the part of a former employer?; and
>
> 2. Whether the failure to include a timely requested instruction in the charge to the jury requires the granting of a new trial?

Collincini v. Honeywell, Inc., 601 A.2d 292, 294 (1992).

Both issues were decided purely on the basis of State Law. *Collincini*, 601 A.2d at 252-296.

In fact, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal filed on behalf of Honeywell. In *Exxon Corporation v. Eagerton*, 462 U.S. 176 (1983) this Court was faced with a somewhat similar scenario. Again with reference to long standing precedent of the U.S. Supreme Court, this Court noted that "when 'the highest State Court has failed to pass upon a Federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Exxon*, 462 U.S. at 180. In *Exxon Corporation* Alabama oil and gas producers had fought a declaration that an Alabama statute increasing the severance tax on oil and gas extracted from Alabama wells and exempting royalty owners from the increases and prohibiting producers from passing on the increase to their purchasers was unconstitutional. On appeal to the United States Supreme Court, this Court noted the following:

> Although Appellants . . . have represented to this Court that the Trial Court held the pass-through prohibition to be preempted by the EPAA, Juris. Statement 3, an examination of the Trial Court opinion reveals that in fact the Court made no mention of the EPAA. Nor does anything in the record before us indicate that the issue was raised in the Trial Court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama . . . but that Court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA preempted the application of the pass-through prohibition to oil, for it does not affirmatively appear that the issue was decided below. Id. (cites omitted).

In the State Court, Honeywell proceeded on purely State grounds and this case was decided based upon the application of State Law. Similarly, Honeywell is attempting to tag on a Federal question to what is and throughout these proceedings has been purely a matter of State Law. The state court proceedings did not involve any issues that would be subject to the appellate jurisdiction of this Court.

CONCLUSION

The decision of the Superior Court of Pennsylvania addressed matters involving the interpretation of State Law. This case does not involve a public figure and does not raise a matter of public concern. Honeywell has not properly raised a Federal Issue. Accordingly, Honeywell's Petition for Writ of Certiorari to the Superior Court of Pennsylvania should be denied.

Respectfully submitted,

VICKI KUFTIC HORNE *
SCHUCHERT HORNE, P.C.
Eighteen East
One Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 645-3000

Counsel for Respondent
Joseph Collincini

**Counsel of Record*
August 26, 1992

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, by first class mail, postage prepaid, this 26th day of August, 1992, upon the following:

Paul A. Koches
Joseph Brooks
Popham, Haik, Schnobrich & Kaufman, Lts.
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005
(202) 962-8700

VICKI KUFTIC HORNE, ESQUIRE